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THE

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THE  
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No. 1

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

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*From certified transcripts in our possession.*

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APPLICATION.

§ 1. FIRE.—*By Company's Agent—Representation.*—The policy was issued upon the survey of the agent of another company, and not upon the representation of the insured or her agent. *Held*, that the company was precluded from claiming any breach of warranty or fraudulent representation in the application upon which the policy was issued.

Rowley vs. Empire Ins. Co., 3 Keyes, 557.

*Reynolds vs. The Commercial Fire Ins. Co.\**

Rep'd Jour'l p. 63.

N. Y. C. A.

CONSTRUCTION.

§ 2. FIRE.—*"Extra Hazardous Purposes."*—The policy provided that if the premises insured should, at any time, be

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\* Decision rendered March 27th, 1873. To appear in 47 New York.

used for the purpose of any trade or occupation, denominated in the policy as specially hazardous, except as therein specially provided for, the policy should be void. Annexed to the policy was a classification of hazards, and among others were, "extra hazardous," and "specially hazardous." "Hide, fat melting, slaughter and packing houses," and also distilleries, were included in the latter class. The policy also contained the following provision, in writing: "The above premises are privileged to be occupied as hide, fat melting, slaughter and packing houses, and stores and dwellings, and for other extra hazardous purposes." Two of the buildings insured were used for distillery purposes, at the time of the fire. *Held*, that "the words in the policy 'or other extra hazardous purposes,' must be taken to mean purposes of the same class as those before specified, and the term 'extra hazardous' must yield to the specification accordingly," and that "legal principles and public policy demand that equivocal language, especially if calculated to mislead the assured, shall be construed most strongly against those using the language and issuing the policies."

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Cocheco Mfg Co. vs. Whittier, 10 N. H., 305; Pindar vs. The Continental Ins. Co., 38 N. Y., 366; 2 Kent's Com., 557.

"It is an elementary rule, that when there is an inconsistency in the written portion of a policy, and indeed of any contract, the written is to be preferred to the printed, as the attention of the parties is supposed to be more directly drawn to such parts as are written, than to the printed, which are used in all cases."

2 Parsons on Contracts, 576; 1 Arnould on Ins., 80.

*Held*, also, that "the plaintiff had a right to use the premises for any specially hazardous purpose."

2 Parsons on Contracts, 501, note u.

*Reynolds vs The Commercial Fire Ins. Co.*

—§ 1.

§ 3. MARINE.—"To Use"—*Port.*—The policy contained a warranty that the schooner should not use ports in the British North American Provinces, except between the 15th day of May

and the 15th day of August. *Held*, that "'to use' means to employ, to hold, to occupy, to enjoy or take the benefit of, as of a chair, a book, a house, a harbor. In connection with the word 'port' it means to go into a harbor or haven for shelter, for commerce, or for pleasure, and to derive a benefit or advantage from its protection. Going near a harbor or port, sailing past, or going in the direction of it, is not a use of the port."

*Snow et al. vs. The Columbian Ins. Co.\**

Rep'd Jour'l p. 53.

N. Y. COM. A.

#### DEPARTURE.

§ 4. MARINE.—*Reasonable Time for.*—The policies were issued on the 18th and 19th days of March upon the vessel, her tackle, apparel, and other furniture, "at and from New York to Havana." It was stated in the applications that the vessel would sail "in a few days." At the time the insurance was effected, the vessel was lying at a dock in the city of New York, fitting for sea, and repairs then making for that purpose were completed on the 6th of April. On the next day she went on a trial trip to Elizabethport, in the State of New Jersey, to test her engines and take in coal. Having taken in coal, she returned to New York on the next or second day, and on her return it was found that she needed further repairs, and that her coal was of poor quality. After the further repairs, she was taken in tow of another steamer, on the 17th or 18th of April, to Jersey City, and on her passage there, was damaged by a collision with another boat. Having repaired this damage and taken in coal, she sailed for Havana on the 2d day of May, and on the next day, while prosecuting her voyage, was destroyed by fire. *Held*, that "the insurance covers the vessel while in port, preparing for her voyage. The rule is that such delay must be for a reasonable time only. As it is expressed in another form, the departure must be in reasonable time," and that there was not, as a matter of law and necessarily,

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\* Decision rendered June Term, 1873. To appear in 48 N. Y.

a breach of the warranty that the vessel should sail in a few days.

*Fernandez et al. vs. Insurance Companies.\**

Rep'd Jour'l p. 41.

N. Y. COM. A.

### NOTICE.

§ 5. FIRE.—*Effect and Extent of.*—The agent of the insured informed the company, at the time the renewal policy was applied for, that he thought a change had occurred in the business, carried on in the premises, and referred them, for information, to another company, that had recently made a survey of the property. *Held*, that "the statement of the agent, therefore, that he thought a change of business had taken place, and a reference to where the facts could be ascertained, was equally effective as a notice of the very change that had been made. In such a case, whatever is notice enough to excite attention and put a party upon his guard, and call for inquiry, is notice of everything, to which such inquiry might have led."

2 Kent's Com., 630, note 1; Kennedy vs. Green, 3 Myl. & Keen, 719.

*Reynolds vs. The Commercial Fire Ins. Co.*

—41.

### POLICY.

§ 6. FIRE.—*Waiver of Condition in—Premium—Agent—Evidence*—The agent of the company, by his clerk, procured a renewal certificate for the plaintiffs, which they agreed to take, telling the clerk to keep it for them till the delivery of another policy, which he was to procure, when they would pay for both, and to this he assented, saying, "The money makes no difference." "The original policy contained the following condition: 'No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.'" *Held*, that "Notwithstanding the condition in the original policy, that no insurance, whether original or contin-

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\* Decision rendered June, 1872. To appear in 48 N. Y.



ued, should be considered binding, until the actual payment of the premium, it was still competent for the insurance company to disregard this condition, and upon any renewal of the policy, to waive, by parol, the payment in cash of the premium; and this waiver of payment could be shown by direct proof that credit was given or could be inferred from circumstances; and the waiver could be by the company or any of its authorized agents. This is too well settled to be longer the subject of discussion or dispute."

Goit vs. The National Protective Ins. Co., 25 Barb., 189; The Trustees of the First Baptist Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 305; Sheldon vs. The Atlantic F. & M. Ins. Co., 26 N. Y., 460; Wood vs. Poughkeepsie Mut. Ins. Co., 32 N. Y., 619; Boehen vs. Williamsburg City Ins. Co., 35 N. Y., 131.

*Bodine et al. vs. Exchange Fire Ins. Co.\**

Rep'd Jour'l p. 23.

N. Y. COM. A.

§ 7. MARINE.—*Avoidance of—Abandonment of Voyage.*—The policies were issued on the 18th and 19th days of March. The insurance in each was upon the vessel, her tackle, apparel and other furniture, "at and from New York to Havana." It was declared, in each policy, that the adventure should begin at and from New York, and should continue until the vessel should be safely arrived at Havana, and there moored twenty-four hours in good safety. The policies also contained the following provision: "And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance." At the time the insurance was effected the vessel was lying at the dock in the city of New York, fitting for sea, and repairs then making for that purpose were completed on the 6th of April. On the next day she went on a trial trip to Elizabethport in the State of New Jersey, from sixteen to twenty miles distant from New York, and not in the ordinary course to Havana, to test her engines and take in coal. Having taken in coal, she returned to New York on the next or second day, and after some further delays for repairs, sailed for Havana on the 2d day of May, and on the

\* Decision rendered Sept. Term, 1872. To appear in 48 N. Y.

next day, while prosecuting her voyage, was destroyed by fire. *Held*, that "assuming that the policies on the vessel insured continued in force till the sixth day of April, after their respective dates, her trial trip to Elizabethport, on that day, avoided them and discharged the defendants from liability for any subsequent loss." "That was a new, distinct, different and intermediate voyage, not in contemplation of the parties at the time their contract was made, and it operated as an abandonment of the voyage insured."

See 3 Kent, 5th Ed., 317; Parson's Mercantile Law, p. 457.

*Fernandez et al. vs. Insurance Companies.*

—44.

§ 8. FIRE.—*Construction of—"Extra Hazardous Purposes"—Knowledge of Company.*—A clause in the policy, after enumerating several purposes for which the premises were privileged to be used, closed with the words, "and for other extra hazardous purposes." Two of the buildings insured were occupied as a distillery at the time of the fire. The company were informed, when they issued the policy, of the fact that the premises were used for this purpose. In giving construction to the term, "extra hazardous purposes," it was *Held*, that "this knowledge is a circumstance proper to be considered, in determining the intention of the defendant, in the language employed, and it does not conflict with the rule that parol evidence is inadmissible to vary the terms of written instruments."

*Doe vs. Beynon*, 12 Ad. & Ell., 431; *Blundell vs. Gladstone*, 12 Eng. Law & Eq., 52.

*Reynolds vs. The Commercial Fire Ins. Co.*

—41.

§ 9. MARINE.—*Avoidance of—Deviation.*—The insurance was upon the vessel, her tackle, apparel and other furniture "at and from New York to Havana." It was declared, in each policy, that the adventure should begin at and from New York, and should continue until the vessel should be safely arrived at Havana, and there moored twenty-four hours in good safety. The policies also contained the following provision: "And it shall and may be lawful for the said vessel, in her voyage, to

proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance." The applications stated that the vessel would sail in a few days. At the time the insurance was effected, the vessel was lying at a dock in the city of New York, fitting for sea, and when repairs, then making for that purpose, were completed, she went on a trial trip to Elizabethport, to test her engines and take in coal. On her return to New York, after making further repairs, that were found necessary, she proceeded upon her voyage to Havana, and was destroyed by fire before reaching that place. Elizabethport is in the State of New Jersey, from sixteen to twenty miles distant from New York, and not in the ordinary course to Havana. *Held*, that "the law is firmly settled that a deviation from the voyage, limited in the policy, unless compelled by necessity, avoids the policy. It matters not how short may be the deviation, nor how harmless. Nor indeed does it aid that it should be shown that the alteration made a shorter and safer voyage, and thus was of positive advantage to the underwriter. The contract is to insure, upon a voyage between the points named in the regular and customary track. The moment the vessel, voluntarily and without necessity, departs from the due course of the voyage, the contract is at an end, and the underwriter is free from all responsibility."

3 Kent's Com., 312; Smith's Mer. Law 3 Amer. Ed., p. 459; Arnould Ins., 354; Stevens vs. Com. Ins. Co., 26 N. Y., 402; Brown vs. Tayleur, 4 Ad. and Ell., 241.

*Held*, also that "when the vessel was at Elizabethport she was neither at New York nor on a voyage therefrom to Havana, and consequently the policies had at that time ceased to protect her, and nothing that subsequently occurred could restore the obligation of the underwriters, and again renew their liability without their consent," and that "there was such a deviation from the voyage insured as to discharge the defendants from their liability under the policies."

*Fernandez et al. vs. Insurance Companies.*

§ 10. *LIFE.—Marginal Clause—Premium.*—The assured surrendered an endowment policy, on which he had paid two annual premiums, partly in cash and partly by two notes, and received from the company a paid-up policy in lieu thereof. The second policy contained the provision that if the assured should not pay the annual premiums, when due, the company should not be liable for the payment of the sum insured. The following memorandum was also written upon the margin of the policy: "This policy is conditioned on the interest on two notes, given in part payment for two premiums paid on No. 10,603, being paid in advance." *Held*, that these words entered upon the margin of the policy, "must be treated as a part of the policy, and the same effect given to them, in determining the character and conditions of the policy, as would be given to them if they had been inserted in the body of the instrument. The rule that entries, so made upon the margin of an instrument, are to be regarded as a part of it, has long been settled in this State and elsewhere, and is not now seriously controverted in the case."

Graham vs. Stevens, 34 Vt., 166; 57 Me., 170.

*Held*, also, that "the consideration of this policy was the premium, which had been paid upon the first, and as such premium was in fact paid by the two notes referred to, the defendants sought to make this policy conditional upon the payment of the interest annually, and in advance, upon those two notes. This object we think was fully accomplished by the memorandum upon the margin."

*Patch et al. vs. The Phoenix Mut. Life Ins. Co.\**

Rep'd. Jour'l p. 36.

Vt. S. C.

§ 11. *MARINE.—Avoidance of—Intention—Use of Port.*—On the 9th of September the company insured the schooner, then lying in the port of Boston, for the term of one year. The policy contained the following clause: "Warranted not to use ports in the continent of Europe, north of Hamburg, nor to go east of Navarino, in the Mediterranean, during the period

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\* Decision rendered February Term, 1872. To appear in 44 Vt.

insured; nor ports on the continent of Europe, north of antwerp, between first November and first March; nor ports in the British North American Provinces, except between the fifteenth day of May and the fifteenth day of August." On the 20th of September the schooner sailed from Boston, in ballast and stores, bound for the port of Lingan, in the island of Cape Breton, in the province of Nova Scotia, one of the British North American Provinces, for the purpose of taking in a cargo of coals, and on the 24th of September, when within about fifty miles of the port of Lingan, and while prosecuting the voyage, was wrecked and totally lost. *Held*, that "to sail towards a port and to come within fifty miles of it, is not, within any sense of the term, to use it. This is not claimed, but it is claimed that the *intention to use* is as much a violation of the policy as the actual use of the port. This claim is not founded in reason or authority. A mere intention to violate a policy can never have the effect of an actual violation. The vessel at the time of her loss was not sailing in forbidden waters, and so long as she had not actually reached a forbidden place, the unexecuted intention to reach one cannot avoid the policy."

N. Y. Firemen Ins. Co. vs. Lawrence, 14 John., 46; Maine Ins. Co. vs. Tucker, 3 Cranch, 357.

*Snow et al. vs. The Columbian Ins. Co.*

—§ 3

#### PREMIUM.

§ 12. MARINE.—*And Risk—Divisibility of.*—By their policies the companies insured the vessel, her tackle, apparel and other furniture, "at and from New York to Havana." It was declared in each policy that the adventure should begin at and from New York and should continue until the vessel should be safely arrived at Havana, and there moored twenty-four hours in good safety. The applications stated that the vessel would sail "in a few days." At the time the insurance was effected the vessel was lying at a dock in the city of New York, fitting for sea, and repairs were then making for that purpose. *Held*, that "a continuous and indivisible risk was contemplated, and

for that, one single premium was fixed and agreed to be paid. There was no division or apportionment of that premium applicable to separate and distinct risks, one having reference to the vessel, during her stay at New York, and the other to perils after her departure."

*Fernandez et al. vs. Insurance Companies.*

—§ 4

§ 13. FIRE.—*Waiver of Pre-payment—Authority of Agent and Agent's Clerk.*—The original policy was issued to the plaintiffs, through John Whelp, an agent of the company, and his name was indorsed upon it. The day after the policy expired, Charles Whelp, his son, called upon the company and obtained a renewal certificate for the plaintiffs, for one year from the expiration of the original policy, which one of the plaintiffs agreed to take, telling him to keep it for them, till the delivery of another policy, which he was to procure, when they would pay him for both. To this he assented, saying, "The money makes no difference." The original policy contained the following condition: "No insurance, whether original or continued, shall be considered as binding, until the actual payment of the premium." Charles Whelp acted as his father's clerk and assistant, and had been in the habit of receiving such renewals from the company, and had frequently, with the knowledge and assent of his father, delivered them to the parties without exacting pre-payment of the premiums. *Held*, that John Whelp had all the powers of ordinary insurance agents, and that it was just as competent for him to waive the condition of pre-payment, as for any other officer or agent of the company, and that it must be inferred that Charles Whelp was authorized by his father to deliver renewal certificates, and waive the pre-payment of the premiums. *Held*, also, that "the agency of John Whelp was not such as to require his personal attention to all the details of the business intrusted to him," and that "an insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums and to take payments of premiums in cash or securities, and to give credit for premiums or to demand cash—

and the act of the clerk, in all such cases, is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case."

*Bodine et al. vs. Exchange Fire Ins. Co.*

—§ 6.

#### PREMIUM NOTES.

§ 14. *LIFE—Annual Payment of—Construction of Policy.*—The assured surrendered an endowment policy, on which he had paid two annual premiums, partly in cash and partly by two notes, and received from the company a paid-up policy in lieu thereof. The second policy contained the provision, that if the assured should not pay the annual premiums, when due, the company should not be liable for the payment of the sum insured, or any part thereof. The following memorandum was also written upon the margin of the policy: "This policy is conditioned on the interest on two notes, given in part payment for two premiums paid on No. 10,603, being paid in advance." At the time of the surrender, the interest on the notes was paid for a year in advance. No further interest was paid, and the assured died more than three and a half years after the second policy was issued. It was claimed that the conditions of the memorandum were complied with when the interest was paid in advance, for the first year. *Held*, that "the interest upon the notes becomes practically a premium upon the policy, payable annually in advance; and on failure to pay the same the company ceases to be liable, and the policy is forfeited. As in this case such interest or premium was not paid, according to the terms of the policy, the plaintiffs cannot recover thereon."

*Baker vs. Ins. Co.*, 43 N. Y., 283; *Pitt vs. Ins. Co.*, 100 Mass., 500.

*Patch et al. vs. The Phoenix Mut. Life Ins. Co.*

—§ 10.

#### WARRANTY.

§ 15. *MARINE.—Use of Port—Principles of Construction.*—The policy contained the following clause: "Warranted not to

use ports on the continent of Europe, north of Hamburg, nor to go east of Navarino, in the Mediterranean, during the period insured; nor ports of the continent of Europe, north of Antwerp, between first November and first March; nor ports in the British North American Provinces, except between the fifteenth day of May and the fifteenth day of August." On the 20th of September the schooner sailed from Boston for the port of Lingan, in the island of Cape Breton, within the British North American Provinces, for the purpose of taking in a cargo of coals. On the 24th of September, when within about fifty miles of the port of Lingan, and while prosecuting the voyage, she was wrecked and totally lost. *Held*, that "warranties must be strictly and perfectly complied with. It is not enough that they be substantially complied with. The compliance must be full and complete, though not necessarily literal."

Phillips Ins., §§ 762 and 766.

*Held*, also, that "the underwriters deemed it sufficient to prohibit the *use* of the forbidden ports, and we cannot give the language used, a broader signification than its ordinary and plain meaning requires. If, after applying the ordinary canons of construction, the meaning remains in doubt, the doubt must be construed against the underwriters, who wrote the policy, and adopted the language which creates the doubt." There was no breach of the warranty by the assured.

*Snow et al vs. The Columbian Ins. Co.*

—§ 2.



# REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

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*From certified transcripts in our possession.*

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## SUPREME COURT OF IOWA,

SEPTEMBER TERM, 1872.

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*Appeal from Des Moines District Court.*

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JOSEPH MICKEY, *Appellee*,

*vs.*

THE BURLINGTON INS. CO., *Appellant*.\* }

The insured, in the application, which was made part of the policy, in answer to a question, stated that his stoves and pipes were well secured, and that he would engage to keep them so. The pipe of a stove passed through the floor of a chamber and thence into a flue. The wife of the insured, intending to remove the stove, took down the pipe in the chamber and placed a bed over the hole in the floor through which the pipe had passed, but neglected to remove the stove. Afterwards, forgetting that the pipe had been removed, she caused a fire to be built in the stove. The fire was communicated to the bed, and the house was consumed.

The insured was obliged to keep the pipe in such condition, and to exercise toward it such care as a man of ordinary prudence would exercise for the protection of his property.

The covenant in the policy did not bind the insured to keep the pipe well secured when not in use, nor did it forbid the temporary removal of the pipe at a time the stove was not in use.

The loss of the property resulted from a negligent attempt to use the stove and the company is liable for the loss.

Insurance on land covers losses occasioned by the mere fault and negligence of the assured and his servants, unaffected by any fraud or design, but it will not cover reckless or inexcusable negligence on the part of the assured, the consequences of which must have been palpably obvious to him at the time.

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\* Decision rendered Oct. 10th, 1872. Statement of the case by C. Linderman, Clerk Supreme Court, Iowa.

The testimony of the insured and his wife that it was the custom in the summer time to remove the stove from the room where it was used and that it was not intended or expected that a fire would be placed in the stove after the removal of the pipe was properly admitted on the trial.

The policy provided that no suit should be sustained unless brought within 6 months after the loss. *Held*, that the jury were properly instructed that if the insured delayed bringing suit until after the expiration of six months, in consequence of inducements held out by the company's officers, causing him to believe that the loss would be paid without suit, that would operate to remove the bar created by the condition of the policy.

On trial the defendant introduced in evidence an affidavit of the plaintiff, setting forth the facts connected with the loss. *Held*, that the plaintiff was properly allowed to explain the circumstances under which it was given, and to state that he did not understand the defendant's purpose in demanding it.

It was competent for the company to waive the required promptness in the proof of loss, and if proof was afterwards submitted, which it promised to consider, agreeing to notify the plaintiff of the result, this action would estop it from pleading the delay, either in making the proof or commencing the suit.

The court is not required to submit improper questions to a jury because requested to do so by a party, nor to give such as are proper in substance in the precise form in which they are presented by counsel.

Questions to which no exceptions were taken in the court below, cannot be reviewed by this court.

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*Dissenting Opinion.*—The use of the stove was a most palpable breach of the plaintiff's agreement, and released the defendant from its obligation to pay any portion of the insurance.

Action upon a policy of insurance against loss by fire, upon the dwelling house and household furniture of plaintiff. By stipulation in the policy, the application of plaintiff for insurance and the survey of the premises are made parts of the instrument with a warranty on the part of the insured. A condition of the contract required the assured, in case of loss, to give "forthwith" notice thereof and to render as soon after as possible, a particular account of such loss, signed and sworn to by the assured, stating the existence of other insurance, if any, the actual cash value of the property, &c., and also to produce a certificate of a magistrate, notary public or commissioner of deeds that he has examined the circumstances attending the loss, &c., and believes the assured has without fraud sustained loss in an amount to be named. Another condition provides that no suit shall be sustained unless it be brought within six months after the occurrence of the loss, and that in case an action should be brought after that time, "it shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The application of the plaintiff for insurance contained the following interrogatory and answer: "Are your chimneys, fire-places, fire-boards, stoves and pipes all well secured, and will you engage to keep them so?" Answer, "Yes."

The special defenses to the action, set out in the answer and relied upon at the trial, are as follows:

1. Unreasonable delay in making proof of loss as required by the policy; the loss having occurred July 7, 1870, the proof was made Oct. 24 following. The notice required by the terms of the policy, it is admitted, was given two days after the loss.

2. The bar of the limitation fixed by the terms of the policy, the action having been commenced more than six months after the loss.

3. Defective stove pipes kept by plaintiff in violation of the terms of the policy, by reason of which the property was destroyed by fire.

Upon a trial to a jury there was a verdict and judgment for plaintiff. Defendant appeals.

NEWMAN & BLAKE, *for Appellant.*

HALLS & BALDWIN, *for Appellee.*

BECK, CH. J.

The facts in regard to the cause and origin of the fire which destroyed the property insured are not contested. They are as follows: The pipe of a stove used in the house passed through the floor of an upper chamber, thence with an elbow into a flue built in the wall. This stove, not being required for use in the summer months, was usually removed. With the intention of removing it, the wife of plaintiff took down the pipe in the second story chamber and placed a bed over the hole in the floor through which the pipe passed, but she neglected to remove the stove. A few days after, a visitor complaining of the cold, the wife caused a fire to be built in the stove. This she did, forgetting that the pipe had been removed. The result was, fire communicated to the bed, and the house was consumed. This occurred in the month of July. There is no evidence that the act of the wife, causing a fire to be built in the stove, was with the intention of destroying the house, but was simply done through negligence and forgetfulness.

I. It is claimed that the removal of the stove pipe was a breach of the covenant of the application, which by its terms became a condition of the policy, to keep the stoves and pipes well secured, and that the policy is thereby defeated, and recovery cannot be had thereon. This covenant bound plaintiff to keep the pipe "well secured." He was obliged thereby to keep it in such condition and to exercise toward it such care as a man of ordinary prudence would exercise for the protection of his property. The defendant was protected by this covenant from the effects of defective pipes and stoves. It did not bind plaintiff to keep them always up or constantly in use. He

could, if his comfort or convenience so required, remove them and dispense with their use. This would not increase the hazard of the risk, and it was not therefore in violation of the conditions of the policy. The contract was entered into with the implied assent of defendant that plaintiff should possess this right. Therefore, if in its exercise, the property was lost, defendant is liable. Does the act of plaintiff come under this rule? The pipe was removed preparatory to removing the stove—the use of both was intended to be dispensed with. The stove was put in a condition not to be used. Its use was just as much intended to be dispensed with as though it had been removed to another room, or into some out of the way place usually set apart as the receptacle of such things when not in use. Had it been so removed, and some one through negligence and thoughtlessness should have kindled a fire therein, resulting in the destruction of the property, the defendant would have been liable, and this would have been so, as we shall presently see, if the act had been done by plaintiff, without fraud or intention to set the house on fire, or without such gross negligence as one with ordinary prudence under no circumstances would fall into. The covenant under consideration does not bind plaintiff to keep the pipe well secured when not in use. If so, he could not take it down or remove it even temporarily. But it cannot be denied that, if, during a temporary suspension of the use of the stove and pipe for the purpose of repairs or the like, a fire should occur through negligence of the character above indicated, in the use of the stove, defendant would be liable for the loss. The case before us is not different in facts and principles. The use of the stove had been dispensed with; the pipe was partly removed, and a negligent attempt was made to use it, from which the loss of the property resulted. These views do not give assent to the doctrine that the covenants and warranties of plaintiff may be disregarded and not literally performed. But we simply maintain that the act of plaintiff in removing the pipe was not covered by the warranty. As all covenants between contracting parties, the undertaking of plaintiff to keep the stoves and pipe secured must be applied to the subject and time within the contemplation of the parties. It will not be extended beyond these to the prejudice of the assured. We cannot so construe it that it will impose restrictions which are unreasonable. *Peterson vs. The Miss. Valley Ins. Co.*, 24 Iowa, 494; *Loud vs. Citizens' Mut. Ins. Co.*, 2 Gray, 221; *Sayles vs. N. Western Ins. Co.*, 2 Curtis C. C., 610; *Turley vs. N. A. Fire Ins. Co.*, 25 Wend., 374; *Townsend vs. W. W. Ins. Co.*, 18 N. Y., 168; *Gloucester M'f'g Co.*

vs. Howard Fire Ins. Co., 5 Gray, 497; Troy F. Ins. Co. vs. Carpenter, 4 Wis., 20; Gates vs. Madison Co. Mut. Ins. Co., 1 Seld., 469; Hide vs. Bruce, 3 Doug., 213; Dobson vs. Southby, 1 Moody & Malin, 90.

We conclude that plaintiff's warranty did not forbid the temporary removal of the pipe at a time the stove was not in use, such restriction not being within the contemplation of the parties.

II. We are now brought to inquire as to the liability of defendant for the negligent acts of the insured and his wife. The law upon this subject seems to be well settled. Story, J., in *The Columbian Ins. Co. vs. Lawrence*, 10 Pet., 507, remarks: "In relation to insurances against fire on land, the doctrine seems to have prevailed for a great length of time, that they cover losses occasioned by the mere fault and negligence of the assured and his servants, unaffected by any fraud or design." This doctrine is recognized by the following authorities: *Huckins vs. Peoples' Mut. Ins. Co.*, 11 Foster, 238; *St. John vs. Am. Ins. Co.*, 1 Duer, 371; *Hynds et al. vs. Schenectady Co. Mut. Ins. Co.*, 16 Barb., 119; *Gates vs. Madison Co. Mut. Ins. Co.*, 1 Seld., 469; *Catlin vs. Springfield Fire Ins. Co.*, 1 Sumner C. C., 434; *Mathews vs. Howard Ins. Co.*, 13 Barb., 234; 1 Phillips on Ins., § 1,096, and authorities cited.

It has been held that this rule will not excuse extreme reckless and inexcusable negligence on the part of the assured, the consequences of which must have been palpably obvious to him at the time. *Chandler vs. Worcester Mut. Fire Ins. Co.*, 3 Cush., 328. But this decision cannot be regarded as in conflict with the current of the authorities. The gross degree of negligence and its inexcusable character, coupled with the knowledge of its certain effects ought, it would seem to us, to raise a presumption that the party intended the obvious and necessary consequence of his act, which at the time was apparent to him.

The principles above stated are substantially embodied in instructions given to the jury. Others, requested by defendant and presenting different doctrines, were refused by the court. These rulings are approved and need not be further noticed.

III. The plaintiff was permitted, against the defendant's objection, to show by his own testimony that it was the custom in his house, in the summer time, to take the stove, from which the fire was communicated to the house, out of the room where it was used. Mrs. Mickey was also permitted to testify, against defendant's objection, "that it was not intended or expected that a fire would be placed in the

stove after the removal of the pipe." It is insisted that this evidence was improperly admitted on the ground, in the first instance, that private customs of a party to a contract do not enter therein, unless known to the other, and in the other case, that the intention or design of one bound by contract to perform it, or not to break it, will not be a defense to a breach.

But these principles are inapplicable to the ruling under consideration. The evidence was not admitted for the purposes stated in the objections of defendant's counsel. As we have seen, it was proper to show that the act of plaintiff and his wife in removing the pipe and kindling the fire in the stove was not done with the intention of destroying the house, but in the ordinary course of their affairs, as they had always been conducted. In the first instance the evidence shows that the removing of the stove was in accord with a general practice, though negligently done in this case. The other evidence tends to establish that the stove with the pipe removed was left standing without the intent of endangering the house. All this evidence shows the fire to have resulted from negligence and not through design, and was for that reason properly admitted.

IV. The jury were directed by the court to the effect that if plaintiff delayed bringing suit until after the expiration of six months in consequence of inducements held out by defendant's officers, causing him to believe that the loss would be paid or adjusted without suit, this would operate to remove the bar created by the condition of the policy requiring an action thereon to be brought within six months after the loss. This instruction is clearly correct. A course of conduct on the part of defendant or representations of its officers which would give reasonable ground upon which plaintiff did in fact base the belief that his claim would be settled, would estop defendant to set up the limitation provided in the policy. It would be contrary to justice for defendant to hold out the hope of an amicable adjustment for the loss, and thus delay the action of plaintiff. and then be permitted to plead this very delay, which was caused by its own representations, as a defense to the action when brought. The law will hear no such defense. *Grant vs. Lexington F. & M. Ins. Co.*, 5 Mo. 22.[?] Certain instructions asked by defendant's counsel upon this point, being inconsistent with this view, were properly refused. They require no further consideration.

V. In compliance with the terms of the policy, plaintiff made and delivered to defendant an affidavit, setting out the facts connected with the loss. This paper was introduced in evidence upon the trial

by defendant. Plaintiff in his own testimony was permitted to explain the circumstances under which it was given, and to state the fact that he did not understand the purpose which defendant had in demanding it. He believed at the time that it was to be used for publication as an advertisement. It was prepared by one of the officers of the company. This evidence was objected to, and its admission is now made the ground of an assignment of errors. The statements of the plaintiff in his evidence do not contradict those of the affidavit. The affidavit was introduced by the defendant to prove the circumstances of the loss, and to establish the admission of plaintiff that he had not done right in permitting the stove to stand after the removal of the pipe. In his evidence, while admitting the statements of facts of the affidavit, he states the understanding he had of its language, and the idea he intended to convey in it. This is certainly not objectionable. If the language of a witness, either written or oral, is introduced to establish an admission, he has the privilege of giving his understanding of its import—of stating its true meaning in the connection as used by him. See 1 Greenleaf's Ev., § 462, note 1. We will not be understood as applying these remarks to contracts, or to admissions which are acted upon by another party, and thus have the force of estoppels. It cannot be claimed that the admission in question possesses the character of an estoppel; it is not shown that defendant was induced thereby to change its condition or to act upon it in any manner.

VI. Formal proof of loss was not made as required by the terms of the policy, until October following the fire. The statement signed and sworn to by plaintiff, above referred to, had been made on the 13th of July. The court instructed the jury that "if the company waived proof of loss in the first instance, and then afterward took under advisement the proof of loss presented in October, and agreed or promised to take action upon it, then plaintiff had the right to wait until defendant took action, allowing or refusing the claim, before bringing his suit." In another instruction the jury were directed that "if you find the secretary or other officer of the company having authority to act for it, promised as agent to notify plaintiff or his attorneys when final action would be taken upon the claim for loss, then it was the duty of defendant to give notice of its final action. These instructions are correct. It was competent for defendant to waive the required promptness in the proof of loss, and if proof was afterwards submitted which it promised to consider, agreeing to notify plaintiff of the result thereof, this action would estop it from pleading the delay either in making the proof or commencing the suit.

The assured could well rely upon the good faith of defendant in respect to these agreements, and govern his actions accordingly.

There was evidence given to the jury to which these instructions were applicable, and upon which they were justified in finding the facts contemplated by the instructions.

VII. The defendant requested the court to direct the jury to return special finding in answer to certain interrogatories to be propounded to them. These questions the court refused to submit to the jury, but gave others prepared in a different form. The refusal to submit the questions prepared by defendant's counsel, is made the ground of certain assignments of errors. We think the action of the court was correct. A part of the questions submitted by defendant's counsel were covered by those prepared by the court and submitted to the jury; others demanded special findings as to facts about which there was no dispute, and which the evidence of both parties clearly established, and others again related to facts that were not in issue or were immaterial. All of the questions may be assigned to one or another of these classes. The court is not required to submit improper questions to a jury because requested to do so by a party, nor to give such as are proper in substance in the precise form in which they are presented by counsel.

VIII. Objections are urged to one of the questions propounded to the jury by the court. No exceptions were taken to it in the court below; it cannot for that reason be reviewed here.

IX. It is insisted that the verdict is not supported by the evidence. We think otherwise. The evidence authorized the jury, in the intelligent and honest exercise of judgment, to find for plaintiff.

The defendant's counsel present the case upon twenty-four assignments of errors, which they have argued under seventeen points. We have not separately discussed each point, believing that all could be sufficiently considered in the manner we have adopted in treating the case. Those not explicitly referred to have been properly considered and we deem them sufficiently answered in the foregoing general discussion of the principles involved in the case.

The judgment of the District Court is affirmed.

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#### DISSENTING OPINION.

MILLER, J.

I am unable to assent to the views expressed in the first paragraph of the foregoing opinion. The plain meaning of plaintiff's agree-



ment is that the stoves and stove pipes in the house insured were well secured and that he would keep them so, in order to guard against damage to or destruction of the property insured by fire from that source while using the stoves in his house for ordinary purposes. The evidence shows that a stove in its usual place in the house was used in the ordinary manner by plaintiff's wife, who had authority so to do, building a fire therein to warm the room, and that *when the stove was so used* the pipe thereto was not "well secured," in consequence of which the house was destroyed by the fire communicated from the stove. This, in my opinion, is a most palpable breach of the plaintiff's agreement, which releases the defendant from its obligation to pay any portion of the insurance.

Upon this ground the judgment of the court below should, in my opinion, be reversed.

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## COMMISSION OF APPEALS OF NEW YORK.

SEPTEMBER TERM, 1872.

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*Appeal from General Term, Superior Court of the City of New York.*

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WILLIAM H. J. BODINE *et al.*, Respondents,

vs.

THE EXCHANGE FIRE INS. CO., OF THE  
CITY OF NEW YORK, Appellant.\*

The original policy was issued to the plaintiffs through John Whelp, an agent of the company, and his name was indorsed upon it as agent. The day after the policy expired, Charles Whelp, his son, called upon the company and obtained a renewal certificate for the plaintiffs, for one year from the expiration of the original policy, which the plaintiffs agreed to take, telling him to keep it till the delivery of another policy, which he was to procure for them, when they would pay for both. To this he assented, saying "The money makes no difference." The policy contained the following condition: "No insurance, whether original or continued, shall be considered as binding, until the actual payment of the premium." Charles Whelp acted as his father's clerk and assistant, and had been in the habit of receiving such renewals from the company, and had frequently, with the knowledge of his father, delivered them to the parties, without exacting payment of the premiums.

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\* Decision rendered September Term, 1872. Statement of the case by H. E. Sickels Esq., State Reporter of New York.

It was competent for the insurance company to disregard this condition in the policy, and upon any renewal of the policy to waive, by parol, the payment in cash of the premium.

This waiver of payment could be shown by direct proof that credit was given, or could be inferred from circumstances; and the waiver could be by the company or any of its authorized agents.

John Whelp had all the power of ordinary insurance agents, and it was just as competent for him to waive the condition of pre-payment, as for any other officer or agent of the company.

Charles Whelp had procured policies and renewal certificates from the company and had frequently delivered them to the persons insured. All this he did with the knowledge and assent of his father, and hence we must infer that he was authorized by his father to do it.

The agency of John Whelp was not such as to require his personal attention to all the details of the business entrusted to him.

An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums, in cash or securities, and to give credit for premiums or demand cash—and the act of the clerk, in all such cases, is the act of the agent, and binds the company just as effectually as if it were done by the agent in person.

The maxim of *delegatus non potest delegare* does not apply in such a case.

There was some evidence tending to show that the plaintiffs accepted the certificate, and arranged that it should be held for them until a future day, when they would pay the premium. Hence, the court committed no error in refusing to dismiss the complaint, and on the charge to the jury.

Appeal from the judgment of the General Term of the Superior Court of the city of New York, affirming a judgment entered upon the verdict of a jury in favor of the plaintiffs. The action was commenced October 3, 1864, against the defendant, to recover for a loss on a policy of insurance, which the plaintiffs claimed that the defendant had agreed to renew, and had renewed by the usual certificate of renewal. The answer admitted the execution of the original policy, but put in issue all the other allegations in the complaint. On the trial, the loss and its amount were proved, as well as the delivery to the defendant of the necessary preliminary proofs, and these facts were not contested. The only question in dispute on the trial was, whether the policy was renewed. The original policy was issued to the plaintiffs through John Whelp, who had been an agent for the defendant for nine or ten years, and his name was indorsed upon the policy as agent. Charles Whelp, his son, had for three or four years acted as his clerk and assistant in the business of his agency.

The policy contained the following condition: "No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium."

The day after the policy expired, Charles, acting for his father, called upon the company and obtained a renewal certificate for the plaintiffs for one year from January 18, 1864, the date of the expiration of the original policy. He had been in the habit for three or four years of receiving such renewals from the company for a similar

purpose, and frequently, with the knowledge of his father, delivered them to, and left them with the parties for whom they were intended, without exacting payment of the premiums. As to what took place, when he took this certificate to the plaintiffs, there is a conflict in the evidence. But William Bodine, one of the plaintiffs, testified substantially as follows: "He said he had brought me a renewal of the Exchange policy, and that the Excelsior Company had refused to renew. On his saying that, I said then I did not know about taking this renewal; if they did not renew, I would prefer putting it all into one company, as we had had some trouble in getting companies to take general policies. Said he, 'you had better take this.' I said, 'I will not decide now; I will think over it; I think I had better get it into one company.' 'Well,' said he, 'will you remain uninsured?' Said I, 'I think I will, for the present at least, until I decide this question in my own mind.' He asked me when I would decide. I said, 'within a day or two; when will you be this way again?' He said, 'Probably to-morrow.' Said I, 'If you come, call, and I will decide.' He did call, and I did decide. I told him I would take this renewal, and he should go on and get me a policy for the like amount, and bearing even date with this policy. Said he, 'then you will take this?' I said, 'certainly.' That is all that took place at that interview that I recollect.

He came over with me on the boat after the second interview; we walked from the boat up Broadway, and were about to separate, he going down Pine street, and I in another direction. He asked me then if I had the Excelsior policy with me; I said I had not it with me. He said, 'then I can't do anything to-day in relation to it,' and we parted at that time. He called for the Excelsior policy, I think, the following day or the day after, and I gave it to him. He then tendered me this renewal, and said, 'You had better take this renewal.' Said I, 'it makes no difference, Charles, you may as well keep it; it is just as safe in your custody as mine; go on and get the other as soon as you can; bring it to me and I will pay you for them both together.' Said he, 'The money makes no difference.' Said I, 'It is not for want of money, it is a matter of convenience; it is just as safe with you, and when you get them both bring them to me, and I will pay you for them.' I said I would pay him for them both; that was my meaning and my saying, both. I said simply that I would pay him for them both together. It was only a matter of convenience. He said, 'Very well.' This last conversation was on Saturday, and the fire occurred on the next Tuesday."

The other plaintiff was also sworn, and confirmed his brother. It was also proved that before the suit was commenced, the plaintiffs tendered the amount of the premium. After the fire, Charles Whelp delivered the certificate to his father, and he delivered it to the company.

At the close of the plaintiffs' evidence, defendant's counsel moved to dismiss the complaint on the ground,

1st. That Charles Whelp was not the agent of the defendant.

2d. That if such agent, he was not authorized to deliver the renewal certificate without payment, or to make the arrangement claimed by the plaintiffs.

3d. That on the evidence, the defendant could not maintain an action against the plaintiffs for the premium.

4th. That the evidence was insufficient to sustain the plaintiffs' alleged cause of action.

The court denied the motion, and defendant's counsel excepted.

At the close of the evidence, the judge charged the jury among other things, as follows :

If you find that Mr. Whelp was agent of the defendant in this matter, and that he did agree with Mr. Bodine at the third interview, that he would trust him for the amount of the premium (\$37.50) until a future period ; and if you find, also, that there was nothing said at that time about Bodine being his own insurer, then, so far as that part of the case is concerned, the plaintiffs would be entitled to your verdict in this action, if the other facts necessary to entitle them to recover are made out.

To this the defendant's counsel excepted.

If the company, through their agent, so conducted the transaction that Mr. Bodine thought himself insured on the property to the amount of \$3,000, and you believe Mr. Whelp was agent of the company, then the plaintiffs, if the other necessary facts as I have before charged are proved to your satisfaction, would be entitled to recover \$3,000 at your hands, with interest after the expiration of sixty days, less \$37.50, the premium.

To this defendant's counsel excepted.

In order to make out the insurance, he must show that Whelp was agent of the company, acting for them, and that he waived the present payment of the \$37.50 premium. If they fail to establish that, the plaintiffs are not entitled to recover. If Mr. Whelp was an agent of this company, he was authorized to make the arrangement with the plaintiffs which they say he did make ; he had a right to trust the

plaintiffs for \$37.50, if he thought fit to do so. If he was not their agent, he had no right to do anything about the transaction.

To this defendant's counsel excepted.

The jury rendered a verdict for plaintiffs, and judgment having been entered upon the verdict, the defendant appealed to the General Term, and then to this court.

J. LANGTON WARD, *for Appellant.*

A. R. DYETT, *for Respondents.*

EARLE, COM.

Notwithstanding the condition in the original policy, that no insurance, whether original or continued, should be considered binding until the actual payment of the premium, it was still competent for the insurance company to disregard this condition, and upon any renewal of the policy to waive by parol the payment in cash of the premium; and this waiver of payment could be shown by direct proof that credit was given or could be inferred from circumstances, and the waiver could be by the company or any of its authorized agents. This is too well settled to be longer the subject of discussion or dispute. *Goit vs. The National Protection Insurance Co.*, 25 Barb., 189; *The Trustees of the First Baptist Church vs. Brooklyn Fire Ins. Co.*, 19 N. Y., 305; *Sheldon vs. Atlantic F. & M. Ins. Co.*, 26 N. Y., 460; *Wood vs. Poughkeepsie Mut. Ins. Co.*, 32 N. Y., 619; *Boehen vs. Williamsburg City Ins. Co.*, 35 N. Y., 131. In the case from 19 N. Y., Judge Comstock says: "A provision in a policy already executed and delivered so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect, except to impart convenient information to persons who may wish to be insured. As such a provision in the policy in question could have no effect upon the delivered and perfect contract in which it was contained, so it could have none to prevent the same parties from making such future contract as they please. In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand or at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place."

We must infer that John Whelp had all the powers of ordinary

insurance agents. He had acted for this company for nine or ten years in procuring risks for it and in delivering policies and renewal certificates. His name was indorsed upon the original policy as the company's agent. It was, therefore, according to the decisions above cited, just as competent for him to waive the condition of pre-payment as for any other officer or agent of the company.

But conceding this, it is claimed on the part of the appellant, that his son Charles Whelp had no authority to waive the pre-payment of the premium so as to bind the company. Charles had been the clerk and assistant of his father for three or four years. He had procured policies and renewal certificates from the company, and frequently delivered them to the persons insured, waiving pre-payment of the premiums. All this he did with the knowledge and assent of his father, and hence we must infer that he was authorized by his father to do it. The agency of John Whelp was not such as to require his personal attention to all the details of the business entrusted to him. We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums and to take payments of premiums in cash or securities, and to give credit for premiums or to demand cash—and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case. Story on Agency, § 14. If the agent or his clerk waive the pre-payment of premiums, without authority from the company, it can lose nothing, as the agent becomes responsible for the amount of the premiums as if the same had been paid to them in cash.

There is another reason for holding the company bound by the act of Charles Whelp in waiving pre-payment of the premium. It delivered to him the renewal certificate, and thus clothed him with approved authority to deliver the same to the assured. If he had delivered it to them without exacting payment of the premium or saying anything about it, according to the cases above cited, it would have been inferred that pre-payment was waived, and the company would have been bound. If his mere silent delivery would have had this effect, much more will his express waiver make the renewal effectual to bind the company.

There was some evidence tending to show that the plaintiffs ac-

cepted the certificate, and that it was arranged that Charles Whelp should hold it for them until a future day, when they would pay the premium. Hence the court committed no error in refusing to dismiss the complaint, and on the charge to the jury.

The judgment must therefore be affirmed, with costs.

"Earle, C., reads for affirmance. All concur. Judgment affirmed, with costs."

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## SUPREME COURT OF ILLINOIS.

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*Appeal from Peoria Circuit Court.*

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THE ILLINOIS MUTUAL FIRE INS. CO., *App't*,  
vs.  
MATHEW STANTON, *Appellee*.\*

The amount of the insurance was by the terms of the policy, made payable, in case of loss, to a third party, who held a mortgage on the premises.

The law is now well settled, that both the mortgagor and mortgagee have a separate insurable interest.

The contract being with the mortgagor, the legal title vested in him, but it was for the benefit of the mortgagee. Hence the suit was properly brought in the name of the assured for the use of the beneficiary.

The policy provided that if there should be any change in the title of the property insured, the company should not be liable for any loss or damage that might occur, unless the policy should have been duly assigned by the consent of the directors, certified on the policy.

The parties informed the local agents of the company that they were about to make a transfer, and were told by the agents that the policy would be good until it could be procured, and the formal consent of the company entered upon it. It had been the custom of the agents to give such consent, and their acts had always been ratified by the company. Before the policy was received and any formal consent entered thereon, the property was destroyed by fire.

*Held*, that in giving such consent, the agents were acting within the scope of their authority. Agents will be held to have such power as the company knowingly permits them to exercise, and the fact that the company ratifies the acts of its agents, will be regarded as evidence of authority in the agents.

An amendment to the charter of the company provided that "any party applying for insurance for one year or less time may pay a definite sum of money for such insurance in lieu of a premium note." *Held*, that a party insuring under this provision of the charter does not become a member of the company and that the law imposes upon him no higher or greater duties than if the insurance had been effected in a stock company.

The notice to the agents must be regarded as notice to the company.

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\* Decision rendered Jan. 22d, 1872.

The provision that the policy should be void in case of any change in the title of the property, was inserted for the benefit of the company, and the company could waive that condition.

Where such a waiver distinctly appears, the party will be estopped from insisting on that which affects the rights of others, and is inconsistent with what he has said and done.

It is in such cases that the doctrine of estoppels *in pais* finds its just application.

This doctrine applies to mutual, as well as to stock insurance companies.

SCOTT, J.

This was an action of assumpsit, brought by the appellee, in the Peoria Circuit Court, against the appellant, on a policy of insurance, issued to Mathew Stanton, on a mill and distillery building, and the machinery and fixtures therein contained. The amount of the insurance was three thousand dollars, which was by the terms of the policy, made payable, in case of loss, to John McClellan, who held a mortgage on the premises. The action is brought in the name of Mathew Stanton, for the use of John H. Bobb, the assignee of the McClellan mortgage. The declaration sets forth the policy sued on, and the several conditions attached thereto, which are specially made a part of the contract of insurance, and avers performance of such several conditions.

The defense sought to be interposed is, that Mathew Stanton sold the insured premises without the consent of the company, and against the terms of the fifteenth condition of the policy.

The appellant filed five several pleas, upon the four first of which issue was proved. Without discussing at length the questions raised on these four pleas, it is sufficient to say that we think the issues were clearly with the appellee on the evidence.

That both the mortgagor and mortgagee have a separate insurable interest, has long been held and recognized by all courts, and the law upon that question is too well settled to be now doubted. In this instance, the interest only of the mortgagor was insured, but the policy contained a clause that in case of loss, the money should be paid to McClellan, the mortgagee. The contract being with the mortgagor, the legal title vested in him, but it was for the benefit of the mortgagee. Hence, the suit was properly brought in the name of Mathew Stanton, the assured, for the use of beneficiary. In the *New England Fire and Marine Ins. Co. vs. Wetmore*, 32 Ill., 221, it was held that the assignee could not bring a suit on a policy of insurance, in his own name, unless authority was given for that purpose in the act incorporating the company. The rule is founded on the principle that such instruments are not assignable at common law, or by any provis-



ion of our statute, so as to give the assignee the right of action in his own name. The appellee, by the production of the policy and the proofs of loss, made a *prima facie* case, entitling him to a recovery, and the question arises, do the facts stated in the fifth plea, as the same are therein pleaded, defeat the right of action? That plea alleges non-compliance with the fifteenth condition of the policy; that Mathew Stanton, by his deed, dated April 21, 1866, under his hand and seal, sold and conveyed the property insured to Adam Stanton, without the company's consent, and in violation of the fifteenth condition of the policy declared on, whereby said policy ceased to be binding, and became void. The fifteenth condition referred to, is as follows: "That in all cases where real and personal property, insured by said company shall become alienated, or shall be sold under execution or decree, or the title to the same shall in any manner be transferred or changed, or of any undivided interest therein, such insurance shall cease and be void, and said company shall not be liable for any loss and damage which may happen to any property after such alienation or change as aforesaid, unless the policy issued thereon shall have been duly assigned or confirmed by the consent of the directors, to the actual owner or owners thereof, previous to the loss and damage. And no policy issued by said company, shall be deemed to have been duly assigned or confirmed, unless the consent of the directors to such assignment or confirmation, is certified on such policy, by the secretary of said company."

The plea was framed under this condition, and was intended to show a forfeiture of the policy, by reason of the sale from Mathew Stanton to Adam Stanton, against the provisions of that stipulation. We do not think the plea is sufficient for that purpose. It does not aver the state of facts which, under that provision of the policy would work a forfeiture. The plea is obnoxious to two objections. First, it is not averred that the conveyance made to Adam Stanton was made before the loss occurred, and second, it is not averred that the directors of the company, after the alienation, did not confirm the same to the actual owner previous to the loss.

It is not indispensable that the assured should first have the consent of the company to make the sale of the property insured. It is sufficient if the policy issued thereon shall have been duly assigned or confirmed, by the consent of the directors, to the actual owner or owners thereof, previous to the loss or damage.

Forfeitures are never regarded with favor by the courts. The party relying on the forfeiture of a contract, must plead every fact neces-

sary to show the forfeiture insisted upon. It does not appear from any averment in the plea, that the alienation took place before the happening of the loss. This was a material averment, and without it the plea is substantially defective. It is averred that the sale of the property was made without the consent of the company, but it is not alleged that the alienation was not subsequently confirmed by the consent of the directors.

In no view that we have been able to take, does the plea state facts which standing alone are sufficient, of themselves, to show a forfeiture of the policy, under the provisions of the fifteenth condition. It is insisted by the counsel for the appellant that the plea must be examined with reference to the declaration, to which it purports to be an answer. It is averred in the declaration that the policy was made on November 22d, 1865, and that the fire occurred on the 11th day of June, 1866. The averment in the plea is that the premises were conveyed on the 21st day of April, 1866, and the appellee having traversed the allegations thereby presented, a material issue was thus proved. We do not see how a plea of this character is aided by a reference to the averment of the declaration. The appellee, however, did reply to the plea in substance—first, that he did not sell to Adam Stanton, as alleged in the plea, upon which issue was joined; second, that at the time, &c., the appellant did consent to such sale and conveyance, and waived the assignment of the policy to Adam Stanton, and the confirmation and certifying the company's consent on the policy; and third that the policy was taken for the benefit of McClellan, and that McClellan assigned the same to C. S. & J. H. Bobb, and that C. S. Bobb assigned the same to J. H. Bobb, all of which assignments were approved and consented to and indorsed by the company on the policy. The appellant interposed a demurrer to the last replication, which was overruled, and the decision of the court, overruling the demurrer, is now among the causes assigned for error.

By the well settled principle of pleading, the demurrer would reach back to the first error in the pleading, and the consequences of a defective pleading will rest upon the party committing the first error; and the appellant cannot complain that a defective replication was allowed to stand to a defective plea. If the replication was bad, the plea is also bad, and both would fall together.

By the appellant's rejoinder to the second replication, and the appellee's surrejoinders thereto, the following issues were formed: First, did the appellant have any notice of the conveyance of the insured

property to Adam Stanton, before the same was made? Second, did the defendants waive the assignment of the policy to Adam Stanton? and, third, did the defendants consent to the sale and conveyance from Mathew to Adam Stanton? Mainly upon these questions the parties seem to have tried the case in the court below. They were questions of fact, and the finding of the jury on the evidence was against the applicant on these several issues submitted to them. It cannot be doubted, in view of the evidence of the case, that the local agents of the company had notice of the conveyance of the property covered by the policy, from Mathew Stanton to Adam Stanton, at and before the date of the conveyance. The parties in interest, before the consummation of the sale, went to the local agents and told them they were about to make the transfer. Other policies on the property were changed by the same agents, in view of the sale, at the request of the parties in interest. The advice of the agents was asked as to the best course to be pursued with reference to this policy, and the parties were told that it would be "good" until it could be procured from St. Louis, and the formal consent of the company entered on the policy itself. Before the policy was received, and any formal consent entered thereon, it appears, from the evidence, that the property was destroyed by fire.

It is objected that the local agents had no authority to give the consent of the company, in this manner, to the sale of the property to Adam Stanton. It is in proof that it had been the custom of the agents to give such consent, and their acts had always been ratified by the company. In giving such consent, the agents were, therefore, acting within the scope of their authority. Such agents will be held to have such power as the company knowingly permit them to exercise, and the fact that the company ratify such acts on the part of their agents, will be regarded as evidence of that authority in the agents. It is manifest from this whole evidence, that if the policy had been received from St. Louis before the loss occurred, that the formal consent of the company to the sale would have been entered upon it, in pursuance with the agreement of the local agents.

That the sale by Mathew Stanton to Adam Stanton of the insured property, if not made according to the provisions of the fifteenth condition contained in the policy, would authorize the company to declare the policy forfeited, we entertain no doubt. It is the contract between the parties that such an act on the part of the assured would work a forfeiture. But the grave question in the case is whether the appellant did not waive the forfeiture, or whether the company is not

now, by the acts of its agents, estopped from denying that they assented to the alienation of the property to Adam Stanton.

In discussing this branch of the case, we are not inclined to attach much importance to the suggestion that this is a mutual company, and that the appellee is a member thereof. By § 1 of amendment to charter, passed February 13th, 1863, Private Laws, p. 202, it is provided that § 8 of the original charter be so amended that "any party applying for insurance for one year or less time, may pay a definite sum of money for such insurance, in lieu of a premium note." While it is true that this company is organized on the mutual plan, this particular transaction does not seem to have any elements of mutuality. In this instance, a sum certain was taken for the insurance effected on the property, and it does not appear from anything in the record that any premium note was ever given.

It would seem that a party insuring under this provision of the amended charter, does not become a member of the company, and stands in no different relation thereto than to any stock company.

The policy sued on was undoubtedly issued under this provision. So far as the appellee is concerned, the appellant in this transaction was no more than a stock company, and he occupied no peculiar relation to it. The law, under such circumstances, would impose upon him no higher or greater duties than if the insurance had been effected in a stock company.

That the company's local agents were notified of the sale of the insured property to Adam Stanton, at the date of the transaction, does not admit of a doubt, and notice to the agents must be regarded as notice to the company. They were applied to for their advice and consent as to the sale, and freely gave it, and promised the parties that the policy should be good until it could be procured from St. Louis, and the proper indorsement entered thereon. Upon this distinct understanding, the sale was completed, and the conveyance executed and delivered. Shall the company now be permitted to retract its consent, and insist upon a forfeiture under the strict provisions of the contract? Had no consent been given by the agents of the company, when applied to for that purpose, it is more than probable that the parties would have stopped their negotiations, until the formal consent could have been obtained. But, relying on the faith of the promises of the agents of the company, that the policy would remain "good" the parties were induced to complete the sale. If, for the doing of that which the company, by their agents, consented that the assured should do, it shall be held to be a forfeiture of the policy, it

would be to permit the company to practice a fraud upon the assured, and thereby relieve themselves from the payment of the risk. The property was transferred to Adam Stanton with the knowledge and consent of the agents of the appellant, and with the distinct agreement to keep the policy good until it should be brought in for the proper indorsement.

The proof shows that all the parties acted in good faith, and relied implicitly on the agreement of the agents of the company.

The company knew the property covered by the policy had been thus transferred to Adam Stanton in ample time to have declared a forfeiture and cancel the policy before the happening of the loss. This they had a perfect right to do. They did not choose to exercise this power, but rather chose to retain the appellee's money, paid for the premium, and carry the risk, notwithstanding the property had been sold contrary to the terms and conditions of the policy. They deliberately elected, with a full knowledge of all the facts, to pursue this course, and ought to be held to such election.

The provisions of the fifteenth condition that the policy should cease and be void in the case of the alienation of the property, was inserted for the benefit and protection of the company, and no reason is perceived why the company may not waive that condition, as well as any other restriction on the assured, inserted in the contract for their benefit. The cases are numerous where persons have been held to have waived provisions and conditions inserted in contracts for their special benefit. Where such waiver distinctly appears, the reasonable rule of law is that the party will be estopped from insisting on that which is inconsistent with what he has said and done, that affects the rights of others. It is in such cases that the doctrine of estoppels *in pais* finds its just application.

The very object to be attained is to prevent injuries from acts and representations which have been acted on, if a party should be permitted to retract. This equitable rule was recognized by this court, in its application to insurance companies, in *Wetmore's case*, *supra*. The same doctrine has repeatedly been held by courts of the highest authority to apply to mutual insurance companies, as well as to stock companies. *Peck vs. New London Ins. Co.*, 22 Conn., 565; *Sheldon vs. Conn. Life Ins. Co.*, 25 Conn., 207; *Bouton vs. The American Mut. Life Ins. Co.*, 25 Conn., 543; *Wing vs. Harvey*, 27 Eng. Law & Eq. R., 140; *Buckbee vs. U. S. Ins., Annuity & Trust Co.*, 18 Barb., 541; *Ang. on Ins.*, § 343.

The case seems to have been fully tried on its merits, and in view

of all the evidence, we are of the opinion that substantial justice has been done, and the judgment of the Circuit Court is, accordingly, affirmed.

Judgment affirmed.

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## SUPREME COURT OF VERMONT,

FEBRUARY TERM, 1872.

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JOHN PATCH AND HIS WIFE LUCY B. PATCH, <i>Plffs.</i> ,	}
<i>vs.</i>	
THE PHOENIX MUT. LIFE INS. CO., <i>Def't.*</i>	

An entry upon the margin of a policy, issued as a "paid-up policy," in exchange for an endowment policy, upon which two annual premiums had been paid, partly by two notes, as follows: "This policy is conditional on the interest on the two notes, given in part payment for two premiums paid on No. 10,803 being paid in advance," *held* to be a part of the policy, the same as though inserted in the body of the instrument.

The notes provided that the interest thereon should be paid in advance, and it was *held* that the effect of the marginal clause was to make the policy conditional upon the payment of the interest *annually* in advance; that the terms of the condition were not complied with by payment of the interest in advance the first year only.

The interest upon the notes became practically a premium upon the policy, payable annually in advance, and on failure to pay the same, the company ceased to be liable, and the policy was forfeited.

Assumpsit to recover a sum specified in an insurance policy. The case was tried upon the following agreed statement of facts:

On the 21st day of February, 1865, the defendants, on the application of Charles W. Ripley, then the husband of Lucy B. Patch, who is now the wife of the said John Patch, and one of the plaintiffs in this suit, assured the life of said Charles W., and executed and delivered to him an endowment policy of insurance for \$5,000, payable to the said Lucy B., when the said Charles W. should attain the age of forty years, (he then being of the age of twenty-four years,) or at the date of the death of said Charles W., should he decease prior to attaining that age, upon the condition, among others, that he pay the defendants the annual premium of \$279, on or before the 21st day of Febru-

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\* Decision rendered February, 1872. Syllabus and Statement of case by W. G. Veazey, Esq., State Reporter of Vt.

ary, in each and every year thereafter, during the continuance of said policy. Said policy is hereunto annexed and made part of this case, and marked "A". Said Charles W. paid two annual premiums on said policy, one at the date thereof, and one in one year thereafter. Said annual premiums were paid partly in cash, and partly by two notes, which are hereunto annexed and marked "B" and "C" respectively, and made part of the case. Said notes were executed and delivered to the defendants on the days when they respectively bear date, by said Charles W. On the 30th day of March, 1867, said Charles W. surrendered said policy to the defendants, who executed and delivered to him another policy of insurance called a "paid-up policy," No. 19,543, in lieu of and in payment of said first named policy, for the sum of \$625, which last named policy is hereunto annexed and made part of this case, and marked "D". It is agreed that if the written memoranda on the margin of said policy "D" are in law a part of the policy, the papers marked "B" and "C" are the notes referred to therein, and it is agreed that said memoranda were upon said policy when it was executed and delivered. Prior to the surrender of said policy "A", the interest on said notes had been paid up to the 21st day of February, 1867, and at the time of its surrender, and previous to the execution and delivery of said policy "D", the interest on said notes was paid one year in advance, and up to the 21st day of February, 1868. Just before the said 21st day of February, 1868, the date when the next annual installment of interest became due on said notes, the defendants sent a notice by mail to the said Charles W., directed to Wilmington, Vermont, it being his last place of residence known to the defendants, informing him when said installment of interest would become due, which notice was returned to the defendants, it not having been called for by said Charles W., at the post office in said Wilmington. The said Charles W., at the time said policy "A" was surrendered, and for some time prior thereto, resided at said Wilmington, but when said notice reached there, as aforesaid, he had changed his residence to Hartford, Connecticut, where he was then residing; but this change of residence was not known to the defendants, they having received no notice thereof. The defendants never gave the said Lucy B. notice that any interest was due on said notes, or demanded payment thereof of her, nor did she have any knowledge or notice that any further payment was required on said policy "D", unless such notice is to be implied from the terms of said policy, neither did she or the said Charles W. ever pay, or offer to pay, any interest thereon except as aforesaid.

Said Charles W. died on the 25th day of October, 1870, at Montague City, Mass., and proper proofs of his death were made and forwarded to the defendants, whereupon the defendants notified the said Lucy B. that said policy "D" had lapsed and was no longer in force, by reason of the non-payment of the interest on said notes, as required by the terms and conditions thereof, and refused to pay the same. The rights of the parties upon the foregoing statement of facts and papers annexed, are submitted for the judgment of the court. Immediately upon the delivery of policy "D", it was passed into the hands of said Lucy B., by her husband, he saying to her, "There is a paid-up policy for you. You'll have so much if I am taken away." And said policy remained in her keeping until the death of her husband, as aforesaid.

The court, Ross, J., presiding, in this case having, *pro forma*, rendered judgment on the above agreed statement of facts, for the plaintiff to recover \$625 damages, the defendant excepted.

"B".

\$139.53.

HARTFORD, February 21st, 1865.

Twelve months after date, for value received, I promise to pay the Phoenix Mutual Life Insurance Company, or order, one hundred thirty-nine 53-100 dollars with interest payable annually, in advance, at 6 per cent., it being for part premium due and payable on policy No. 10,603 of said company, on the life of Charles W. Ripley, dated February 21st, 1865, which policy, and all payments or profits, which may become due thereon, are hereby pledged and hypothecated to said company for the payment of this note.

No. 10,603. Interest \$8.40.

CHARLES W. RIPLEY.

The other note, called paper "C" in the agreed statement, was for 140 2-100 dollars, and was in same terms as paper "B".

*Policy "D".*

PHOENIX MUTUAL LIFE INSURANCE COMPANY, HARTFORD, CONN.

No. 19,543.

\$625.

Paid-up Policy in lieu of 10,603, of Feb. 21, 1865.

2-16 paid.

This Policy of Assurance Witnesseth, that the Phoenix Mutual Life Insurance Company, in consideration of the representations made to them in the application Interest, of this Policy, and of the sum of five hundred and \$16.80. fifty-eight dollars and ten cents, to them in hand paid by Lucy B. Ripley, do assure the life of Charles W.

Annual Pre- Ripley, of Wilmington, in the county of Windham, mium, State of Vermont, for the sole and separate use and



**\$558.10.[?]** benefit of the said Lucy B. Ripley, in the amount of six hundred and twenty-five dollars, payable to the said Lucy B. Ripley or her executors, administrators or assigns, on the 21st day of February, 1881, when the said C. W. Ripley shall have attained the age of forty years, or to her executors, administrators or assigns should Charles W. Ripley die previous to attaining that age.

**Age, 24.**

And the said company do hereby promise and agree to and with the said assured, well and truly to pay, or cause to be paid, the sum assured, as aforesaid, within ninety days after notice and proof of interest, (if assigned or held as security,) and of the death of the said Charles W. Ripley.

**Term:**

**Pay at 40.**

This policy "D" contained the ordinary provisions found in policies, among which was the following:

And it is also understood and agreed, to be the true intent and meaning hereof, that in case the said assured shall not pay the said annual premiums on or before the several days herein before mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof; and this policy shall cease and determine.

And it is further agreed, that in every case where this policy shall cease, or be, or become null and void, all payments made thereon and all dividend credits accruing therefrom, shall be forfeited to the said company.

This policy was duly signed, and dated March 30, 1867.

The marginal clause referred to above is as follows:

This policy is conditional on the interest on two notes given in part payment for two premiums paid on No. 10,603 being paid in advance.

On the back of said policy was the following inscription.

#### *Purchase of Policies.*

The company will purchase any of its policies, while in force, on which two annual payments have been paid, and give for them their equitable value; or if the party prefers, will issue a *new paid-up policy*, for the amount of insurance that the equitable value of the policy surrendered will purchase, thus making ALL policies *non forfeitable*.

DUNTON & VEAZEY, and J. M. TYLER, *for the Defendants.*

CHAS. N. & G. W. DAVENPORT, *for the Plaintiffs.*

## PIERPOINT, CH. J.

The first question that naturally arises upon the case, as made up and agreed upon by the parties, is whether or not the memorandum entered upon the policy of insurance prior to its execution and delivery, is to be treated as a part of the policy, to be considered and taken into account in determining the true meaning and effect of the instrument itself. We think the entry upon the margin of this policy, of the words, "This policy is condition on the interest on the two notes given in part payment for two premiums paid on No. 10,603 being paid in advance," must be treated as a part of the policy, and the same effect given to them in determining the character and conditions of the policy, as would be given to them if they had been inserted in the body of the instrument. The rule that entries so made upon the margin of an instrument are to be regarded as a part of it, has long been settled in this State, and elsewhere. and is not now seriously controverted in the case. *Graham vs. Stevens*, 34 Vt., 166 ; 57 Maine, 170. .

Regarding this memorandum as a part of the contract of insurance, what then is the true legal effect and scope of the whole instrument? It appears from the agreed statement of facts, that on the 21st day of February, 1865, Charles W. Ripley, then the husband of Lucy B. Patch, the female plaintiff in this case, procured of the defendants what is called an endowment policy of insurance, for \$5,000, payable to the said Lucy B., when the said Charles W. should attain the age of 40 years, (he then being 24 years of age,) or at the death of the said Charles W., should he decease prior to attaining that age, upon the condition that he pay the defendants the annual premium of \$279, on or before the 21st day of February, in each and every year, during the continuance of said policy. On this policy the said Charles W. paid two annual premiums, partly in money and partly by two notes, which two notes are the same that are referred to in the memorandum on the policy now under consideration.

On the 30th day of March, 1867, the said Charles W. and the defendants entered into an arrangement by which the aforesaid endowment policy was surrendered, and the present policy, which is called a "paid-up policy," issued in lieu thereof. The consideration of this last policy was the premium which had been paid upon the first, and as such premium was in part paid by the two notes referred to, the defendants sought to make this policy conditioned upon the payment of the interest annually, and in advance, upon those two

notes. This object we think was fully accomplished by the memorandum upon the margin.

But it is said that as the memorandum only refers to the payment of the interest in advance, and does not say annually, the terms of the condition were complied with when the interest was paid in advance for the first year. This we think is quite too narrow a construction. The interest upon the notes, by their terms, is to be paid annually, and it is such interest that the memorandum refers to and requires to be paid in advance. Any other construction would be a manifest violation of the meaning and intent of the parties to this contract. The defendants having taken the notes in the place of the money, it could not reasonably be expected that the defendants would do less than to secure the payment of the interest thereon, by making the new policy dependent upon its payment. Treating the memorandum as a part of the policy, and the whole to be considered the same as though it was included in the body of the instrument, the interest upon the notes becomes practically a premium upon the policy, payable annually in advance; and on failure to pay the same the company ceases to be liable, and the policy is forfeited.

As in this case such interest or premium was not paid, according to the terms of the policy, the plaintiffs cannot recover thereon. *Baker vs. Ins. Co.*,\* 43 N. Y., 203; *Pitt vs. Ins. Co.*, 100 Mass., 500.

Judgment reversed, and case remanded.

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## COMMISSION OF APPEALS OF NEW YORK,

JANUARY TERM, 1872.

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*Appeal from General Term of Superior Court, of City of New York.*

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ANTONIO R. FERNANDEZ AND THEODORE G. SCHOMBERG, <i>Respondents</i> ,	}
vs.	
THE GREAT WESTERN INS. CO., <i>Appellant</i> .†	
THE SAME, <i>Respondents</i> ,	
vs. THE NEW YORK MUT. INS. CO., <i>Appellant</i> .	}

One policy was issued on the 18th day of March, 1863, and the other on the next day

\* 1 *Ins. Law Jour.* 1, 95. † Decision rendered June, 1872. Statement of the case by H. E. Eckels Esq., State Reporter of New York.

thereafter. The insurance in each was upon the vessel, her tackle, apparel and other furniture, "at and from New York to Havana." It was declared in each policy that the adventure should begin at and from New York, and should continue until the vessel should be safely arrived at Havana, and there moored twenty-four hours in good safety. The policies also contained the following provision: "And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance." The application stated that the vessel would sail "in a few days."

At the time the insurance was effected, the vessel was lying at a dock in the city of New York, fitting for sea, and repairs then making for that purpose, were completed on the 6th of April. On the next day she went on a trial trip to Elizabethport, in the State of New Jersey, from sixteen to twenty miles from New York, and not in the ordinary course to Havana, to test her engines and to take in coal. Having taken in coal, she returned to New York on the next or second day, and on her return it was found that she needed further repairs, and that her coal was of poor quality. After the further repairs she was taken in tow of another steamer, on the 17th or 18th of April, to Jersey City, and on her passage there was damaged by a collision with another boat. Having repaired this damage and taken in coal, she sailed for Havana on the 2d of May, and on the next day, while prosecuting her voyage, was destroyed by fire.

Assuming that the policies on the vessel insured continued in force till the sixth day of April, her trial trip to Elizabethport, on that day, avoided them and discharged the defendants from liability for any subsequent loss.

A continuous and indivisible risk was contemplated, and for that one single premium was fixed and agreed to be paid. There was no division or apportionment of that premium applicable to separate and distinct risks, one having reference to the vessel during her stay at New York, and the other to perils after her departure.

A departure from New York, except on a voyage to Havana, is inconsistent with the provisions of the policies, and the continuity of the risk contemplated by them.

When the vessel was at Elizabethport she was neither at New York nor on a voyage therefrom to Havana, and consequently the policies had at that time ceased to protect her, and nothing that subsequently occurred could restore the obligation of the underwriters, and again renew their liability without their consent.

There was such a deviation from the voyage insured as to discharge the defendants from their liability under the policies.

If it be conceded that there were separate and independent risks, one on the vessel while in port "at New York," and the other on the voyage "from New York," the latter never attached. That was a new, distinct, different and intermediate voyage, not in contemplation of the parties at the time their contract was made, and it operates as an abandonment of the voyage insured.

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This insurance covers the vessel while in port preparing for her voyage. The rule is, that such delays must be for a reasonable time only. As it is expressed in another form: The departure must be in a reasonable time.

There was not, as a matter of law and necessarily a breach of the warranty that the vessel should sail in a few days.

The law is firmly settled that a deviation from the voyage limited in the policy, unless compelled by necessity, avoids to policy.

It does not aid that it should be shown that the alteration made a shorter and safer voyage, and was thus a positive advantage to the underwriter.

The defendants appeal in these cases from judgments of the General Term of the Superior Court of the city of New York, entered on verdict in favor of the plaintiffs, on overruling exceptions by the defendants, ordered to be heard in the first instance at General Term.

The actions were brought to recover the amount insured on the propeller J. F. Barnard, afterwards called the *Mono*, under two several policies issued by the defendants respectively. The policy of the Great Western Insurance Company was dated on the 18th day of March, 1863, and that of the New York Mutual Insurance Company

on the next day thereafter. They were severally issued to "A. R. Fernandez & Co., on account of whom it may concern," insuring the said vessel her tackle, apparel and other furniture, "at and from New York to Havana," among other perils, against that by fire, to the amount of seven thousand five hundred dollars, for a premium of three hundred and seventy-five dollars.

The provisions in the policies material to the decision of the questions involved in these appeals, are substantially the same, with this exception. The policy of the Great Western Insurance Company contained the following clauses which were not contained in that of the New York Mutual Insurance Company, viz.: "And it is also agreed that this policy covers only the original interest subsisting when negotiating, and that any change of interest in whole or in part, shall cancel the policy in the same ratio. And it is further agreed that this policy shall be void in case of its being assigned, transferred or pledged, without the previous consent, in writing, of this company."

It was declared in each of the policies that the adventure upon the said vessel, tackle and apparel, was to begin at and from New York aforesaid, and should so continue and endure until the said vessel should be safely arrived at Havana, and be there moored twenty-four hours in good safety; and among other provisions in each was the following: "And it shall and may be lawful for the said vessel in her voyage, to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this insurance."

In the applications for insurance it was stated that the vessel would sail "in a few days." It appeared on the trial that at the time the insurances above mentioned were effected, the vessel was lying at a dock at the foot of Corlaer's slip, or that vicinity, in the city of New York, fitting for sea, and that repairs and additions then in progress for that purpose were completed by the sixth of April. On that day she went on a trial trip to Elizabethport, in the State of New Jersey, sixteen to twenty miles distant from New York, to test her engines and to take in coal there. Having taken about seventy tons of coal on board, she returned to New York, on the next or the second day after she left New York. On her return trip it was discovered that her exhaust or escape pipe was too deeply submerged, and that the coal was of poor quality. After her arrival at New York, the coal was discharged, and the difficulty or defect in regard the pipe was remedied. She was then, on the seventeenth or eighteenth of April,

taken in tow of another steamer to Jersey City, to take in a new supply of coal. While on her passage there she came in collision with a schooner, and sustained considerable damage, which was repaired by the first day of May. Having taken in her coal and provisions, she, on the morning of the next day, sailed for Havana, and on the third day of May, while prosecuting her voyage, she was destroyed by fire.

A bill of sale of the vessel from the plaintiffs to Clement Kain, expressing the sum of thirty-five thousand dollars as the consideration, which bore date the fourth day of April, 1863, and was indorsed as recorded at the British Consulate on the same day, and a mortgage on her from Kain to the plaintiffs, bearing date the sixth day of the same month, to secure the sum of thirty thousand dollars stated therein to be lent to him by them, together with a power of attorney of the same date from him to them, authorizing them to take possession and the general control and management of the vessel, and also to make sale of her, were given in evidence, but there was no proof showing when either of the said instruments was in fact delivered, nor that the delivery of the bill of sale and mortgage were simultaneous acts, and it does not appear that the mortgage was for a part of the purchase money mentioned in the bill of sale, nor for any other consideration than a loan of the sum secured, as stated in the mortgage.

A motion was made on behalf of the respective defendants, when the plaintiffs rested their case on the grounds, among others, that the above facts showed a change of interest subsequent to the issuing of the policies, and that there was a deviation from the voyage insured, by a delay in sailing on the voyage to Havana, till the second of May, and by making the trial trip to Elizabethport in the meantime. The motions were denied, and proper exceptions were taken.

At the close of the whole testimony, the court, against an exception by the defendants, directed the jury to find a verdict in favor of the plaintiffs for the amount insured, with interest, less the premium note due to the Great Western Insurance Company, with interest.

The above exceptions, and others taken to the admission and exclusion of evidence, not necessary to be particularly noticed, were ordered to be heard in the first instance at General Term. They were all overruled—Barbour, J., dissenting—and a judgment was entered on the verdict for the plaintiffs, from which the defendants respectively have appealed to the Court of Appeals.

JOSEPH H. CHOATE, for Great Western Ins. Co., }  
R. S. EMMET, for New York Mut. Ins. Co., } *Appellants.*  
R. H. HUNTLEY, for *Respondents.*

LOTT, CH. COM.

Assuming that the policies on the vessel insured continued in force till the sixth day of April after their respective dates, her trial trip to Elizabethport on that day avoided them, and discharged the defendants from liability for any subsequent loss. The vessel was insured "at and from New York to Havana." This insurance imposed a liability on the defendants from the time it was effected, and was to continue until the arrival of the vessel at Havana, allowing her to remain a reasonable time at New York preparatory to sailing for her place of destination. A continuous and indivisible risk was contemplated, and for that one single premium was fixed and agreed to be paid. There was no division or apportionment of that premium applicable to separate and distinct risks, one having reference to the vessel during her stay at New York, and the other to perils after her departure. The provision in the policies that the adventure upon her was to begin "at and from" New York, and so continue and endure until her safe arrival at Havana, and being moored there for twenty-four hours in good safety, clearly defines when the liability was to commence, and shows that it should be continuous from that time until the period fixed for its termination.

A departure from New York, except on the voyage to Havana, is inconsistent with that provision, and the continuity of risk contemplated by it, and the subsequent clause, providing that it should and might be lawful for the said vessel, on her voyage, to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to the insurance, declares by necessary implication, that a deviation from any other cause would be unauthorized, and consequently could not be made without impairing the claims of the assured.

Elizabethport was not a part of, or within the port or harbor of New York, but is in the State of New Jersey, distant sixteen to twenty miles from New York, and not in the ordinary course of a voyage to Havana, and no necessity is shown for proceeding to that place, either for making a trial trip or taking in coal. That voyage must, in the absence of any proof to warrant it, be considered as voluntarily made, and in violation of the terms and conditions upon which the liability of the defendants was assumed.

It was entirely distinct from and unconnected with the voyage insured. Although the vessel returned to New York, and afterwards sailed for Havana, that was not the voyage in the contemplation of the parties or intended to be insured, when the insurance was effected. They acted and made their contract having reference to the facts and circumstances existing at that time. The vessel was then nearly ready for sea. It was expected that she would sail in a few days, and that on leaving New York she would proceed direct on her voyage to Havana. There is not the least foundation, or any plausible color to justify the conclusion or an inference that either party, when referring to the adventure, "at and from New York," described in the policies, had reference to or could have meant one that should begin after the vessel had sailed therefrom and again returned thereto, subsequent to a voyage to another place, or in other words that it should begin after an independent and intermediate voyage had been made and entirely completed. It is also clear that when the vessel was at Elizabethport, she was neither at New York nor on a voyage therefrom to Havana, and consequently the policies had at that time ceased to protect her, and nothing that subsequently occurred could restore the obligation of the underwriters, and again renew their liability, without their consent. It follows from the preceding considerations that there was such a deviation from the voyage insured as to discharge the defendants from their liability under the policies.

The motions for the dismissal of the complaints should therefore have been granted, and the judgments were erroneously ordered against them. It is, however, proper to refer to the opinion of the majority of the court below on ordering judgment for the plaintiffs. Monell, J., by whom it was given, says: "Although the underwriters are discharged if the loss occurs upon a policy 'at and from' a port of departure, while the vessel is away from such port for any unexcused purpose, 'yet they will not be absolved if the vessel returns in safety, and is afterwards lost upon her voyage; and one reason is that the policy covers two risks, one at the port of departure and the other from such port upon the voyage to the port of destination. These risks are wholly independent and distinct from each other. The former insures against the enumerated perils while the vessel lies in port, and if she is taken from such port for any unjustifiable purpose, and is lost while absent from such port, the obligation of the insurers is at an end. The latter risk is limited to the voyage, and takes effect upon the departure of the vessel. If at that time no loss has occurred, the contract continues binding'." That construction



cannot be sustained. No case or authority is cited to support it, and the court concedes that it is opposed to and adverse to the decision in *Brown vs. Tayleur*, 4 Ad. & Ell., 241 (31 Eng. C. L. Rep., p. 60.)

In that case the insurance was on a ship "at and from her port of lading in North America to Liverpool." After she had taken a part of her cargo on board at one port, she sailed to another in the same bay of the sea, described by different witnesses as five or seven miles distant, but not in the line of voyage to Liverpool, to complete her loading. After remaining there three weeks and taking in additional cargo, she returned to the port which she had left to receive provisions, water and wood and to be got ready for sea. Nine days afterward she sailed therefrom for Liverpool, and was lost on the voyage.

It was held (Lord Denham, C. J., and Judges Patterson, Williams and Coleridge, *seriatim*, giving opinions) that the port where she commenced loading was her port of lading within the meaning of the policy, and that her departure therefrom to another port, as above stated, was a deviation and avoided the policy.

The same principle was decided by the Supreme Court of this State, in *Vos & Lightbourne vs. Robinson*, 9 John. Rep., p. 192. In that case the voyage insured was "at and from Port Plata, St. Domingo, to New York," and the vessel covered by the policy was shipwrecked and lost in going from Port Plata to Susua. She had a permit from the government at Port Plata to go to Susua for the loading of mahogany, and would have been obliged to return to Port Plata for her clearance. Susua was included within the revenue district of Port Plata, and about four leagues east therefrom. It was held that Port Plata proper was the port of departure, and that there was a *deviation* from the voyage insured. It will be seen that the vessel had not cleared for New York, and consequently was not in the course of her voyage there, at the time of her loss, but that she had to return to Port Plata, her port of departure. The result of the decision, therefore, is that the policy ceased to be binding and effectual after the vessel left that port, although for a temporary object and purpose only, and with the intention on the part of her master to return thereto, and it affirms the proposition above stated by me, that the vessel insured under the policies in question was not protected or covered by them when she was at Elizabethport. See, also, 1 Phil. Ins. § 1,000; 2 Parsons on Ins., 7, and 46 to 52.

Without further citation of authorities, a perfect answer to the position, that the policy covered two risks, independent and distinct from each other, exists in the fact that there is but one *single and*

*entire* premium. What portion of this was applicable to the risk on the vessel while in port, and what portion on that during her voyage? It is impossible to say.

It may also be asked, If there were two risks how much was the amount insured on each risk? Certainly not the whole sum of \$7,500 specified in the policies, and there is no means of determining the proportion. And if for any cause the plaintiffs should have become entitled to a return of a portion of the premium on either risk, how much would be returnable?

I forbear to pursue these inquiries or the further consideration of the question. If it be conceded that there were separate, distinct and independent risks, the fact does not benefit the plaintiffs. It would then follow as a practical result that there are in fact two policies, one on the vessel while in port "at New York," and the other on her voyage "from New York." The latter under the facts disclosed in the case never attached. The voyage to Elizabethport clearly is a bar fatal to a recovery. That was a new, distinct, different and intermediate voyage, not in contemplation of the parties at the time their contract was made, and it operated as an abandonment of the voyage insured. See 3 Kent, 5th Ed., 317; Parsons Mer. Law, p. 457.

Having reached the conclusion that the judgments appealed from are erroneous, on a ground common to both cases, I do not deem it necessary to consider the effect of the bill of sale from the plaintiffs to Kain, nor any of the other questions raised on the trial.

The judgments must be reversed and a new trial ordered on the ground stated, costs to abide the event.

"Lott, Ch. C., reads for reversal; Hunt, C., reads for reversal. All concur. Judgment reversed, new trial ordered, costs to abide event."

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HUNT, COM.

The application for insurance of the vessel, signed by the plaintiffs' agent, contained a warranty that the vessel was in "perfect order," and also that she would "sail in a few days."

On the trial no attention was called to the first branch of this objection. When the plaintiffs' case was closed, the defendants moved for the dismissal of the complaint upon four different grounds specifically stated. Neither of them contained any reference to this objection,

nor was there any allusion to it when the case was finally closed at the circuit. Evidence was given to show that the underwriter was informed that the vessel was undergoing extensive repairs and was being thoroughly remodeled, and that the inspectors employed by the underwriter visited her and made their reports upon her condition. This was expressly denied on the other hand. It is quite likely that there was a fair question under this point to be submitted to the jury, if such submission had been requested. No such request was made, and under the evidence as it stands, and without attention to the point on the trial, we are not justified in saying that there was a breach of this warranty as to the condition of the vessel.

The alleged breach in the other respect, to-wit: That she should "sail in a few days." formed one of the grounds of the motion to non-suit, but there was no request that the jury should receive any instructions in relation to it.

The insurance covers the vessel while in port, preparing for her voyage. The rule is that such delay must be for a reasonable time only. As it is expressed in another form, the departure must be in a reasonable time. Were there no excusing facts in the case, a delay of forty-five days in the clearing of a ship, whose intended voyage would occupy only five or six days, would appear to be unreasonable.

Here, again, the conflict of testimony is important to be considered. If the vessel was in perfect order, ready for sailing, but a few days literally would be required to load and start her, or should be allowed for that purpose. If, on the other hand, the vessel was in good order for river navigation, but was being remodeled and substantially rebuilt to fit her for an ocean steamer, several weeks might well be exhausted in that duty. Again, this vessel while under repairs met with various disasters and calamities, which delayed her completion. I cannot discover such a state of facts as upon the principles of law laid down by the appellants, would justify the court in saying that as a matter of law and necessarily there was a breach of the warranty that the vessel should sail in a few days. The jury might have so found, but the question was not submitted to them, and neither party asked that it should be. 1 Arnould, 383; 1 Parsons Mar. Law, 281.

The principal point in the case is that arising upon the alleged deviation in visiting the port of Elizabeth, New Jersey, a distance of 16 to 20 miles, for a trial trip, and to procure coal. This occurred on the 6th of April. The port of Elizabeth was not on the route to Havana, and was reached by going down the New York Bay, either outside or inside of Staten Island, but in each case inside of Sandy

Hook. She returned from Elizabeth to New York within a day or two. When loaded at Elizabeth with seventy tons of coal, it was found that her exhaust pipe was submerged and needed to be altered. The coal was found to be unsuitable and was removed, and other coal substituted. Coal could readily be obtained at different places in the port of New York. The defendants offered to prove that by the custom of New York, trial trips are the subjects of separate insurance and separate premiums; also, the usual insurance premium on a voyage to Elizabeth, both of which offers were excluded by the court. The court directed a verdict for the plaintiffs for the amount of the loss.

The law is firmly settled that a deviation from the voyage limited in the policy, unless compelled by necessity, avoids the policy. It matters not how short may be the deviation, nor how harmless. Nor indeed does it aid, that it should be shown that the alteration made a shorter and safer voyage, and thus was of positive advantage to the underwriter. The contract is to insure upon a voyage between the ports named, in the regular and customary track. The moment the vessel voluntarily and without necessity departs from the due course of the voyage, the contract is at an end, and the underwriter is freed from all responsibility. 3 Kent's Com., 312; Smith Mer. Law, 3d Amer. Ed., p. 459; 1 Arnould Ins., 354; Stevens vs. Com. Ins. Co., 26 N. Y., 402.

Brown vs. Tayleur, 4 Ad. & Ell., 241, is in point. The Penrith was insured "at and from her port of loading in North America to Liverpool." The vessel took in a part of a cargo of timber at Cocayne, New Brunswick, in July. In August she sailed to Buktouche, five to seven miles distant, to complete her cargo. Buktouche and Cocayne are situated on different creeks of the same bay. The vessel returned to Cocayne on the 22d of August, to get wood, water and provisions. She took on no additional cargo there unless a few sticks of timber, which was doubtful. She sailed for England on the 31st of August, and was lost on the voyage. Neither of these ports had a custom house, though there were officers of customs at both places, and both were within the jurisdiction of the custom house of St. Johns, N. B. 31 E. C. L. R., 60.

It was held by the Court of King's Bench, Ch. J. Denman presiding, that there was a deviation, and the policy was avoided. Justice Patterson says: "When she began to take on her cargo at Cocayne, that was her place of lading, and her removal afterwards to Buktouche was a deviation." Justice Coleridge says: "It makes a difference

whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo."

*Vos & Lightbourne vs. Robinson*, 9 J. R., 191, is an earlier case in our courts, where the same point was adjudged and in the same manner. *Elliot vs. Wilson*, 4 Br. Par. Cas., 470; *Kettell vs. Wiggins*, 13 Mass. R., 68, are decisions to the same effect, on facts of quite a similar character.

I find but a single authority which seems to conflict with these general views. In *Parsons on Mar. Law*, 2d, p. 278, § 2, the writer says: "It is perfectly well settled that any deviation whatever discharges the insurers from all further responsibility, leaving them, however, liable for a loss occurring before the deviation, and caused by a peril insured against. Nor are they discharged if the change of risk is merely temporary, and when it ceases, all subsequent risks are precisely and certainly the same as they would have been had no deviation taken place. In this case the effect of the deviation is only to suspend the responsibility of the insurers and discharge them from any liability for a loss which occurred during the existence of the deviation. But it is obvious that there are few changes of risks that can be said to leave all the subsequent perils in precisely the same condition as if there had been no change, and this exception therefore is seldom applicable." The answer to this authority, as applicable to the present case, is apparent. The rule thus laid down by *Parsons* is true as to a time policy, under certain contingencies, but never as to a voyage policy. The illustration given by the learned author in the note is of that character. Thus he says, if a steamboat makes regular trips between two ports, is insured for one year, and if after the trip for the day is ended she should tow a vessel or do any similar act, the underwriters would clearly be liable if she were subsequently lost in a regular trip or while lying in port, but not if she were lost while engaged in towing. This may be. If so, it would be upon the principle that the time policy operates as a new and separate insurance upon every trip made between the ports designated. Every time that she starts from the port of departure a new insurance comes into existence, and it might well be said that the offences committed upon a former voyage and under a former policy, could not affect the last voyage. See *Day vs. Orient*, 1 Daly R., 13; *Robertson vs. Columbian*, 8 J. R., 491.

The qualification imposed by the learned author, "that all subsequent risks shall be certainly and precisely the same as if no deviation had taken place," destroys the rule. No such certainty can

exist. If the vessel is delayed an hour or hastened an hour, it is obvious that she may incur perils which that change of time created or increased. It is impossible to say with certainty that every circumstance of time, place, weather, enemies, condition of the captain or crew, or vessel, occurring after a change, would have been the same had there been no change. The vessel we are looking after spent three days in going to Elizabeth and returning. The coal there loaded was taken out and other coal put in. How many hours alteration in the time of her final departure this made, who can tell? Who can tell whether she received a strain not perceptible, a secret injury, some damage to the coal bins, which was connected with her subsequent destruction by fire? These are speculations. They may be well founded. They may be entirely without foundation. They serve to illustrate the danger of departing from the well settled rule of law. I repeat it, as well expressed by Justice Sedgwick, in *Coffin vs. Newburyport Mar. Ins. Co.*, 9 Mass. R., 436: "It is undoubtedly true that the shortness of the time, or the distance of the deviation makes no difference as to its effect on the contract. Whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity, it puts an end to the contract.

The plaintiffs seek to obviate the difficulty by the argument that the voyage to Elizabeth was a trial trip, and that such experiment was necessary before the vessel could safely proceed on her voyage to Havana. All the cases show that necessity excuses a deviation such as stress of weather, compulsion of a superior power, or a change for the relief of a vessel in distress. But it must be necessity. Thus in *Phelps vs. Auldjo*, 2 Camp., 350, when the master of a vessel went out of a harbor by order of the captain of a frigate lying near, to examine a strange sail, *Ld. Ellenborough* ruled it to be a deviation, remarking that if he had gone by compulsion or under threat or just fear of violence, it would not have been so. No necessity is shown for the vessel in this case to go out of the limits of the port of New York. Apparently she could have been tested as well by going down the bay to Staten Island, as by going to Elizabeth. She did not go out into the broad ocean, as it appears that her voyage was inside the Hook. The opportunity to test her fitness for the sea could have been perfectly attained without going to another port, in another State, at a distance of eighteen or twenty miles. On this point, as well as the supplying her with coal, there is not the slightest evidence of a necessity for leaving the port of New York. The contract bound

her to remain in the port of New York, "at New York," until she should take her departure "from New York to Havana." See authorities, *supra*. This contract was violated by the deviation to Elizabeth, without compulsion or necessity, and the responsibility of the underwriter thereupon ceased.

Judgment should be reversed; a new trial ordered, costs to abide the event.

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## COMMISSION OF APPEALS OF NEW YORK,

JANUARY TERM, 1872.

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*Appeal from General Term of First District.*

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AMBROSE SNOW AND JOSEPH S. BURGESS, *App'ts*, }

*vs.*

THE COLUMBIAN INS. CO., *Respondent*.\*

On the 9th of September the company insured the schooner, then lying in the port of Boston, for the term of one year. The policy contained a warranty that the schooner should not use ports in the British North American Provinces, except between the 15th day of May and the 15th day of August. On the 20th of September, the schooner sailed from Boston, for a port in one of these provinces, for the purpose of taking in a cargo of coals, and on the 24th of September, when within about fifty miles of the port, and while prosecuting the voyage, was wrecked and totally lost.

Warranties must be strictly and perfectly complied with. It is not enough that they be substantially complied with. The compliance must be full and complete, though not necessarily literal.

"To use," in connection with the word "port," means to go into a harbor or haven for shelter, for commerce or for pleasure, and to derive an advantage from its protection. Going near a harbor or port, sailing past, or going in the direction of it, is not a use of the port.

In the matter of performing contracts, except on some nice points of deviation, the intention is not usually important. It is the act or fact, by which the result is determined.

There was no breach of warranty by the assured.

If, after applying the ordinary canons of construction, the meaning remains in doubt, the doubt must be construed against the underwriters, who wrote the policy, and adopted the language which creates the doubt.

To sail towards a port and to come within fifty miles of it, is not within any sense of the term to use it.

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\* Decision rendered June, 1872. Statement of the case by H. E. Sickels, Esq., State Rep'r of N. Y.

A mere intention to violate a policy can never have the effect of an actual violation. So long as the vessel had not actually reached a forbidden place, the unexecuted intention to reach one cannot avoid the policy.

The facts of the case, as they appear by the pleadings, and as admitted upon the trial, are as follows, viz :

First. That during all the times mentioned in the complaint, the plaintiffs were co-partners in business, under the firm name of Snow & Burgess.

Second. That the defendant, during all the times mentioned in the complaint was, and now is, a corporation formed under and by the laws of the State of New York.

Third. That on the 9th day of September, 1864, in consideration of the premium of six hundred and sixty dollars, the defendant made and delivered to the plaintiffs its policy of insurance, by which the defendant insured the plaintiffs for six thousand dollars, upon the schooner *Caspian*, then owned by the plaintiffs, and lying in the port of Boston, Massachusetts, from the 8th day of September, 1864, at noon, until the 8th day of September, 1865, at noon.

The policy contained the following clauses : "Warranted not to use ports on the continent of Europe, north of Hamburg, nor to go east of Navarino, in the Mediterranean, during the period insured ; nor ports on the continent of Europe, north of Antwerp, between 1st of November and 1st of March ; nor ports in the British North American Provinces, except between the 15th day of May and 15th day of August ; also warranted not to use the West India Islands, during the months of August and September ; also warranted not to use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico ; nor places on or over Oranoke Bar ; nor any of the West India Salt Islands ; nor ports or places on the west coast of America, north of Benecia, during the period insured ; nor to use the Min River ; nor Torres Straits."

At the time when the policy in question was issued, and for a period long anterior to that time, it was the established custom of underwriters in the City of New York to charge an additional premium for the use of ports in the British North American Provinces, between the 15th day of August and the 15th day of May in every year, and this was owing to the supposed increased dangers of the navigation incident to the use of said ports during that period.

Fourth. That on the 20th day of September, 1864, said schooner *Caspian* sailed from said Boston, in ballast and stores, bound for the port of Lingan, in the Island of Cape Breton, in the Province of



Nova Scotia, one of the British North American Provinces, for the purpose of taking in a cargo of coals. That the vessel proceeded on her voyage, and on the night of the 24th of September, while so proceeding, was wrecked, and totally lost on the coast of the Island of Cape Breton, within sight of the Louisburgh light, on said Island, and about fifty miles from said port of Lingan.

Fifth. That the plaintiffs, at the time of taking said risk and of said loss, were the sole owners of said schooner Caspian, and that her value exceeded six thousand dollars, and was about seven thousand dollars.

Sixth. That on the 15th day of October, 1864, the plaintiffs furnished to the defendant all necessary preliminary proofs of loss and interest, and that no objection is made to said proofs for insufficiency or want of proper services thereof.

Seventh. That the freight on the cargo of coals which said schooner Caspian was bound to Lingan to take on board, was insured by the defendant by a policy executed to the plaintiffs at the same time as the aforesaid policy, on the body of said vessel.

Eighth. That the premium note upon said policy, for \$661.25 was due on the 11th day of September, 1865, and that the said note and interest to date are to be detached from the said loss.

The defendant's counsel moved for a dismissal of the complaint, upon the ground that the warranty in the policy not to use ports in the British North American Provinces, except between the 15th May and 15th August, having been violated, the plaintiffs were not entitled to recover.

The court refused the motion, and ordered judgment for the plaintiffs for \$5,782.33.

Upon appeal to the General Term of the First District, this judgment was reversed, and a new trial was ordered. From this order the plaintiffs appealed to the Court of Appeals, giving the stipulation required by law.

R. H. HUNTLEY, *for Appellants.*

DUDLEY FIELD, *for Respondent.*

HUNT COM.

Warranties must be strictly and perfectly complied with. Phillips Ins., § 762. It is not enough that they be substantially complied with. Ib. The compliance must be full and complete, though not necessa-

rily literal. *Ib.* §§ 762, 766. Mr. Justice Kent said in *Kemble vs. Rheinlander*, 3 Johns. Cas., 130, that "a warranty must be literally complied with, but this strict compliance ought to operate in favor of as well as against the assured, whenever he can bring himself within the terms of it."

In the case of a warranty that "the ship should have twenty guns," and she had in fact twenty-two guns, but only twenty-five men, a number short of the necessary complement for twenty guns, there being no ground to impute fraud, Lord Mansfield held this to be a compliance with the warranty, and that the assured was entitled to recover. *Hyde vs. Bruce*, Marsh., 847; 3 Dougl., 213; cited 1 Phil. Ins., § 767.

That the assured have literally complied with and kept their warranty in this case, can scarcely be doubted. A vessel cannot be said to have used a particular port, when it is conceded that she has not been within fifty miles of it.

"To use" means to employ, to hold, to occupy, to enjoy or take the benefit of, as of a chair, a book, a house, a harbor. In connection with the word "port," it means to go into a harbor or haven for shelter, for commerce or for pleasure, and to derive a benefit or advantage from its protection. Going near a harbor or port, sailing past, or going in the direction of it, is not a use of the port. Certain ports, it is declared in the warranty, shall not be used, as those on the continent of Europe, north of Hamburg, nor ports in the British North American Provinces, except at certain dates, nor the West India Islands at certain dates, nor certain ports of Texas, etc. That this exclusion refers to places specifically, and not to the regions adjacent, is evident from the fact, that as to Navarino, in the Mediterranean, the exclusion is directed in form to the region, as distinguished from the port. It is stipulated in that case, without reference to ports or places, that the vessel shall not "go east of Navarino, in the Mediterranean, during the period insured." If the vessel shall go east of that port, whether she enters any or all the ports therabouts, or returns having entered no port, the warranty is broken. As to Texas, again, the warranty is peculiar "not to use ports and places in Texas, except Galveston." The region is not excluded. One port is not excluded. All other ports are excluded, and the entry into any one of them except Galveston would constitute a breach of the warranty.

The distinction between traversing a region and entering into a port or harbor in the region, was evidently in the view of the contracting parties. This is an answer to the argument "that it was

the clear intent of the underwriters in this restriction to guard against the danger which arises from navigating near the coast of the British Provinces, at certain seasons of the year." The language is singularly unfortunate to embrace such a proposition. It imports that in certain latitudes the regions were themselves deemed to be dangerous, and that the vessel must not enter those regions; that in other latitudes the underwriters had no fears of the region, provided the dangers of using certain harbors or ports were avoided. To meet the case, certain ports in the north of Europe and on the British North American coasts are excluded, the region being open for use, while in the Mediterranean and in the Gulf certain regions must not be entered by the vessel.

The defendant insists again, that an intention to enter the prohibited port creates a breach of the warranty. I cannot concur in this argument. No authority is cited to sustain it, and it is against all principle. In the matter of performing contracts, except on some nice points of deviation, the intention is not usually important. It is the act or fact by which the result is determined. A man may determine to violate his contract, or to defraud his neighbors a thousand times and in a thousand ways, and yet not place himself within the reach of the law. He may perform his contract, when he intends to violate it. If his acts are right, a secret, bad intent cannot injure him; nor if his acts are wrong, can a good intent save him. If the assured intended to go to some other port in Texas than Galveston, but in fact went directly to Galveston, and the vessel was lost, while in that port, there would be no breach of the warranty. But if her master voluntarily carried his vessel east of Navarino, in the Mediterranean, although he did not intend to go east of that port, and did not know that he had done so, his warranty would be broken. In each case, the fact, and not the intent to keep the warranty, or to violate it, gives the legal character to the transaction. 2 Par. Mar. Law, ch. 3, § 1. When the question is one of deviation, the point of when and where the departure commences, may be important. The point here is upon the warranty not to enter a certain port, and is not a question of deviation.

The case of *Stevens vs. The Com. M. Ins. Co.*, 26 N. Y., 397, is cited by the respondents. In that case, the vessel was "warranted not to use ports or places in Texas, except Galveston, nor in the Gulf of Mexico." Permission was afterwards given "to use the port of Laguna, for her voyage, without prejudice to this insurance." The vessel arrived at Laguna, but did not enter that port; it not being a

port of entry, the custom house officers would not permit the entry. She then sailed for Sisal, for the purpose of paying the duties, and intending to return to Laguna for her cargo. At Sisal she went ashore and was lost, The Court of Appeals held that the entry at Sisal was not justified, and that the warranty was broken. I should say that the real question in that case was, whether the permission to enter the port of Laguna carried with it the power to take all measures necessary to effect that purpose, or whether the permission was to be literally construed. At any rate, the case bears no analogy to the one we are considering.

In my opinion there was no breach of warranty by the assured.

The order of the General Term should be reversed, and the plaintiffs should have judgment on the verdict, with costs.

"Leonard, C., not sitting. Hunt, C., reads for reversal. Earle, C., reads for reversal. Lott, Ch. C., and Gray, C., concur. Order reversed, and judgment ordered for plaintiffs, with costs."

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EARLE, COM.

The only question in this case, arises out of a warranty in the policy that the vessel should not "use ports in the British North American Provinces, except between the 15th day of May and the 15th day of August. On the 20th day of September, 1864, the vessel sailed, bound for the port of Lingan, in the Island of Cape Breton, in the Province of Nova Scotia, one of the British North American Provinces, for the purpose of taking in a cargo of coals, and while on her way, and before reaching the destined port, she was wrecked on the coast of the island of Cape Breton, about fifty miles from said port.

Precise and definite language is used in the policy in reference to the warranties, and if it had been intended to prohibit the vessel from sailing along or near the coast of the British North American Provinces, the prohibition would probably have been inserted in apt and proper language. The underwriters deemed it sufficient to prohibit the use of the forbidden ports, and we cannot give the language used a broader signification than the ordinary and plain meaning requires. If, after applying the ordinary canons of construction, the meaning remains in doubt, the doubt must be construed against the underwriters, who wrote the policy and adopted the language which creates the doubt.

To sail towards a port, and to come within fifty miles of it, is not, within any sense of the term, to *use* it. This is not claimed. But it is claimed that the *intention to use*, is as much a violation of the policy as the actual *use* of the port. This claim is not founded in reason or authority. A mere intention to violate a policy, can never have the effect of an actual violation. The vessel at the time of her loss was not sailing in forbidden waters, and so long as she had not actually reached a forbidden place, the unexecuted intention to reach one cannot avoid the policy. *N. Y. Firemen Ins. Co. vs. Lawrence*, 14 John., 46; *Maine Ins. Co. vs. Tucker*, 3 Cranch, 357.

Order of General Term reversed, and judgment for plaintiffs upon the verdict, with costs.

**SUPREME COURT OF MISSOURI,**

**JANUARY TERM, 1872.**

*Appeal from Franklin Circuit Court.*

PACIFIC MUTUAL INS. CO., *Respondent*,  
*vs.*  
 FREDERICK GUSE, *Appellant*.\*

The premium note specified that it was given for a policy issued by the company, and was to be paid in such portions and at such times as the directors of said company might, agreeably to the general incorporation laws of the State and the by-laws of the company, require.

Under the statutes of the State a certified copy of a resolution passed by the board of directors, by which an assessment was levied on all premium notes, was admissible in evidence.

**The defendant, under the statute was not liable at the mere discretion of the directors. There must have been actual losses or expenses, before he was liable.**

**The protection of the party making the note requires that the company should show the necessity of the assessment, not by a mere resolution or declaration, but by proof that payment was legally required.**

WAGNER, J.

**This was an action commenced before a justice of the peace to**

\* Decision rendered January Term, 1872.

recover an assessment of \$17.50 made by the plaintiff against the defendant, on a premium note for \$70. The note specified that it was given for a policy issued by the insurance company, and was to be paid in such portions and at such times as the directors of the said company might, agreeably to the general incorporation laws of the State and the by-laws of the company, require.

Before the justice of the peace defendant obtained judgment, but on appeal to the Circuit Court, judgment was had for the plaintiff.

The only question of any importance in the case is the ruling of the court in admitting evidence. The plaintiff offered in evidence and the court admitted a copy of a resolution passed by the board of directors, by which an assessment of 25 per cent. was levied on all premium notes held by the company, to discharge the indebtedness of the company up to a certain date. The resolution was duly certified to by the president and secretary of the company, with the seal of the company affixed.

The defendant objected to the admission of the resolution as evidence, on the ground that the plaintiff had not proved any loss sustained, for which an assessment ought to be made, and on the further ground that a copy of the resolution was no evidence of any acts of the plaintiff; that the original ought to be produced, or its absence accounted for. So far as the second point raised in the objection goes, the law settles it against the position taken by counsel. The statute in relation to evidence provides that copies of all records and papers on file in the office of any company incorporated under the general or special laws of this State, when certified by the secretary or president, and authenticated by the seal of said company, shall be received as *prima facie* evidence in all courts in this State, in the same manner and with like effect as the original. Wagn. Stat., 592, § 18.

But the first objection raised presents a question of more difficulty. The case comes under the provisions of the law relating to fire insurance companies, as contained in the General Statutes of 1865, pp 357-9. Section 16 provides for persons becoming members of the company, regulates the manner of taking premium notes, specifies the amount to be paid down, and then says that the remainder of the notes "shall be made payable in part or in whole, at any time when the directors shall deem the same requisite for the payment of losses or other expenses or purchases." Section 20 empowers the board of directors of every mutual insurance company, in order to settle the losses sustained by fire, and the expenses of the company, to make

an assessment or assessments, at convenient times, wherein they shall determine the sums to be paid by the several members of the company; and section 26 gives the board of directors power to make an assessment or assessments as often as they deem it necessary to meet the liabilities of the company, and provides that the assessments shall be made payable within thirty days, and that they may also include the necessary incidental expenses.

These statutory provisions are essentially the same as exist in several of the States of this Union, and while they have never come up for construction heretofore in the Supreme Court of this State, they have often been passed upon by the courts of other States, and the adjudications are harmonious and uniform.

In *Thomas vs. Whallon*, 31 Barb., 172, the charter of the company provided that the notes taken by it for premiums should be paid in whole or in part, and at such times as the directors should deem requisite for the payment of losses and such incidental expenses as should be necessary for transacting the business of the company. By an amendment of the insurance law which applied to the company, it was provided that the directors should, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, \* \* \* settle and determine the sums to be paid by the several members thereof, as their respective portions, and that the same should be paid thirty days next after notice. And the court held that upon a proper construction of the foregoing provisions, the directors of the company had no arbitrary discretion in making assessments, but that it devolved upon it to aver and prove that the contingency had happened upon which the defendant's liability had become absolute. So in *American Ins. Co. vs. Schmidt*, 19 Iowa, 502, where the defendant made his note to plaintiff, by which he agreed to pay, for value received, the sum claimed in a certain policy of insurance, "in such portions and at such time or times as the directors of said company may, agreeably to their charter and by-laws, require," it was held that the company could not recover on the notes for an assessment made thereon without alleging and proving that losses and expenses had actually occurred.

And to the same effect are all the cases that we have found in construing like statutes. *Bangs vs. Gray*, 2 Kern, 477; *Ilerkimer Co. Mut. Ins. Co. vs. Fuller*, 14 Barb., 373; *In re Bangs*, 15 Barb., 264; *Atlantic Ins. Co. vs. Fitzpatrick*, 2 Gray, 279; *Long Point Ins. Co. vs. Houghton*, 6 Gray, 77; *Savage vs. Medbury*, 19 N. Y., 32; *Bangs vs. Duckinfield*, 18 N. Y., 592.

The liability of the defendant is not an absolute liability to pay the whole amount of premium or deposit note, but it is conditional, depending upon the contingency of the happening of losses to which he shall be liable to contribute, and which have been ascertained by the directors, and the necessity of the payment of the whole or part of the note to satisfy the claim. The promise of the defendant is to pay upon certain conditions, and the existence of those conditions must be shown by the party seeking to enforce the contract. *Stow vs. Wadley*, 8 Johns., 124 ; *Ferris vs. Purdy*, 10 Johns., 359. Nor was the defendant liable at the mere discretion of the directors. There must have been actual losses or expenses before defendant was liable, as it was for these alone that he was liable, according to the very terms of his contract.

Does the mere passage of a resolution show a right to recover, or should there not be other proof that the payment of the assessment was necessary to meet losses and expenses? To require further proof of the plaintiff is imposing no impossible or unreasonable burden. The proof of the facts on which defendant's liability rests is in the possession of the plaintiff and is easily made. But the other rule would cast the burden of showing negatively that there had been no such losses and expenses as rendered the assessment necessary. And this would involve an examination of the records and papers under the control of the opposite party. There is no arbitrary discretion to make assessments by the directors, and they do not act judicially, and their action is not a proceeding *in rem* which binds all directly or indirectly affected. This conclusion would seem to follow from the nature of the contract between the parties. Assessments can not be made on these premium notes unless the necessity therefor properly and legally arises. The protection of the party conditionally bound demands that the other party should show the necessity, not by a mere resolution or declaration, but by proof that payment was legally required. The proof is easily made, and protects alike the interests of all. To hold otherwise, would be to place those who have given their premium notes wholly in the power and at the caprice of the board of directors.

The judgment should be reversed and the cause remanded.

The other judges concur.



## COURT OF APPEALS OF NEW YORK.

*Appeal from General Term of Court of Common Pleas of the City of New York.*

SOPHIA V. D. REYNOLDS, *Respondent*,

*vs.*

THE COMMERCIAL FIRE INS. CO., OF N. Y., *App't.\**

The policy provided that if the premises insured should at any time be used for the purpose of any trade or occupation, denominated in the policy as specially hazardous, except as therein specially provided for, the policy should be void. Annexed to the policy was a classification of hazards, and among others were "extra hazardous" and "specially hazardous." "Hide, fat melting, slaughter houses," and also distilleries, were included in the latter class.

The policy contained the following provision in writing: "The above premises are privileged to be occupied as hide, fat melting, slaughter and packing houses, and stores and dwellings, and for other extra hazardous purposes." Two of the buildings insured were used for distillery purposes, at the time of the fire.

It is an elementary rule that where there is an inconsistency between the written and the printed portion of a policy, the written is to be preferred to the printed.

The words in the policy, "or other extra hazardous purposes," must be taken to mean purposes of the same class as those before specified, and the term "extra hazardous" must yield to the specifications.

The insured had a right to use the premises for any "specially hazardous purpose."

Equivocal language, especially if calculated to mislead the assured, must be construed most strongly against those using the language and issuing the policy.

The agent of the insured informed the company, at the time the renewal policy was applied for, that he thought there had been a change in the business carried on in the premises, and referred them to another company that had recently made a survey of the property.

This was as effective as a notice of the very change that had been made.

The knowledge of this change was a circumstance proper to be considered in determining the intention of the company in the language employed, and it does not conflict with the rule that parol evidence is inadmissible to vary the terms of the written instrument.

The defendant is precluded from claiming any breach of warranty or fraudulent representation in the application upon which the first policy was issued.

It was issued upon the survey of the agent of another company, and not upon the representation of the plaintiff or her agent.

Appeal from judgment of the General Term of the Common Pleas of the City of New York, affirming a judgment entered upon a verdict in favor of plaintiff.

\* Decision rendered March 27th, 1872.

By the terms of the policy in question, the premises were "privileged to be occupied as hide, fat melting, slaughter and packing houses, and stores and dwellings, and for other extra hazardous purposes." According to the classification of hazards in and by the policy, the division and distribution of risks is as follows, viz: Into "first class," including "not hazardous," "hazardous No. 1," and "extra hazardous No. 1;" and into "second class," including "hazardous No. 2," "extra hazardous No. 2," "extra hazardous No. 3," and "specially hazardous." Each of the above subdivisions of hazard contains a specific designation of the "trades, occupations and merchandise" intended to be comprehended therein.

The clause in the policy in relation to "specially hazardous" risks, contained the following provision, viz: "The following trades, occupations and merchandise, add to the rate of the building and its contents fifty cents or more per \$100, and to be covered must be specially written in the policy;" and after mentioning a number of particular trades and articles of merchandise, winds up with the clause, "and all workshops, manufacturing establishments, trades and mills, not above enumerated as hazardous or extra hazardous." Distilleries are not included under the heads "hazardous" or "extra hazardous."

On the 3d of July, 1866, a fire broke out in the general premises in question, extending from Nos. 23 to 29, inclusive, by which Nos. 24 and 25 were entirely destroyed, and the others damaged and partially destroyed. The fire originated in Nos. 24 and 25. Nos. 24 and 25 were then occupied as a distillery and rectifying establishment.

In the body of the policy, following the description of the premises insured, is the following clause: "If the above mentioned premises, at any time during the period for which this policy should otherwise continue in force, shall be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein any articles goods or merchandise denominated hazardous or extra hazardous, or specially hazardous in the second class of the classes of hazards annexed to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing, upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect.

The policy sued upon was a renewal of a previous policy, covering the same premises.

[Concluded in February Number.]

## MISCELLANEOUS DEPARTMENT.

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### INSURANCE AUXILIARY TO THE PRODUCTION OF WEALTH.

BY PROF. WM. TWINING, OF ST. LOUIS.

Every product of human labor that conduces to the health, comfort and welfare of man is accounted as wealth. Money is only its artificial representative. Whatever, therefore, stimulates or facilitates labor, or mitigates the depressing effects of disaster, or prevents sudden revolutions in trade, or helps to carry men over the hard places of misfortune, is entitled to be accounted as an important auxiliary to the increase of the public property. Tested by the support which it renders to individual, and, of course, to general production, insurance deserves to be ranked among the wealth-producing agencies that distinguish the civilized from the uncivilized conditions of man. Every product of human toil is liable to destruction by fire or accidents in transportation, and every destruction entails a public loss. When the loss falls heavily upon the individual possessor, if it fall so severely as to crush the energies of his nature, or to disable his wealth-producing power, or it, through his commercial affiliations, it draw prosperous men into financial embarrassment, the evils of non-insurance are made appreciable. When, on the other hand, the loss, instead of resting upon a single person, is distributed in small sums upon a large number of co-insurers, the ease with which business returns to its accustomed channels, and flows on as if no interruption had occurred, gives evidence of the efficacy and value of the relief which this principle of distribution is able to furnish, and of its worth as a regulating power in commercial society.

The soliciting agent of an insurance company, whose interest lies solely in his percentage profit and the credit of the company which he represents, very naturally and with great propriety addresses his appeals to the self-interest of those whose patronage he desires to secure. But the philosophic economist surveys the subject from a higher level, and with a broader conception of its bearing upon the wide range of trade and production. The office of insurance in these depart-

ments is no less important than that of the bank. In its relation to agriculture, and the mechanic arts, and the business of transportation, storage and interchange, its agency is absolutely indispensable as a means of safety. In preserving men from impoverishment and ruin by fire and accident, and in securing the conservation of the wealth-producing industries of society, it performs offices which support and extend useful enterprises, and it thereby becomes an efficient promoter of the highest and best civilization.

The principles that lie at the foundation of insurance, and which impart to it the power of useful action, are such as arise out of the true interests of man in his broadest social relations.

The growth of civilization involves a constantly increasing breadth of production, a more intimate and extended intercommunication between different sections of the country, and a state of mutual dependence, between the multiplying branches of industrial employment, which renders reciprocal protection indispensable to the highest development of wealth-producing enterprises. Modern society is based upon ideas which invite every individual to bring into use the highest productive powers of his mind and body, by directing his attention to some useful occupation, stimulating him, at the same time, to invent new and improved methods of utilizing labor, and making it subservient, in the highest degree, to the creation of wealth. The effect of this is seen in the multiplication of mechanical inventions, in the employment of machinery for work which formerly was carried on by hand, in the increase of marketable commodities, and in the intensity with which all classes of persons devote themselves to their respective pursuits. The popular furor in the search for wealth, which is the legitimate fruit of the spirit of the new civilization, requires only to be held within the limits of law, civil, social and moral, under a system of mutual protection against disaster, to be made a most efficient means of developing a very advanced and desirable state of financial prosperity. But whether it be well regulated or not, its effect in increasing production, and in extending commercial interchange is nevertheless real, and the state of things which is thus brought into existence is one in which a sense of common interest in commercial society naturally suggests and requires protective co-operation. Among wandering savages, and in semi-civilized communities, where the interests of property and trade in articles of production are very limited, there is no demand for this kind of protective action, and therefore it is not found in such societies. But in communities where that higher form of civilization prevails which is founded upon the universal equality of man, and the right of each individual to use and

enjoy the fruits of his own labor, it is easy to see that diversified industries must arise, and that the several forms of production which spring from these varied pursuits, and the divisions of labor which they naturally create, and the complicated relations which are thereby constituted between the different branches of industrial and mercantile life, require a special financial organization, in which the bank and the insurance corporation shall perform co-ordinate offices, the former as the organ by which capital shall facilitate the exchanges of trade and supply its current needs, the latter as the institution by means of which any number of associated individuals shall become sureties for each other in the event of any disaster by fire or accident; and mutual sharers in the loss. In the vast affiliations of industry and trade, which arise in civilized communities, every disaster which involves destruction of property is as sure to disturb the healthful equilibrium of trade as an electric storm in the sun is to convulse the correlated members of the solar system. On this account the insurance of properties which are exposed to hazard, is a necessary remedial agency, whereby, in case of loss, not only the individual is reinstated in his personal credit and means of prosecuting business, but the many with whom he holds commercial relations are saved from loss on his account. It is for this reason that insurance always follows closely on the heels of civilization, and that it is found to exist only in this class of communities. This fact proves, and the philosophy of the fact confirms the conclusion, that it is a necessary and distinguishing element of the highest form of social development.

It is further evident that the custom of co-insurance springs from some natural law or social idea—from some absolute though unrecognized principle of equity, which has its origin in the unity of man and the essential community of his interests. Otherwise, it would, like gambling, be contrary to natural law and not legitimate. Some persons, taking this view of insurance, urge the moral objection that it is betting on contingencies. The fact that such objection is made is not mentioned as in itself of any considerable importance, or as requiring formal refutation, but is of use in this connection, and proper to be named, because it adds clearness and certainty to the proposition that the true foundation of insurance is the natural law of reciprocity in the commercial relations of man, a law not arbitrary, but founded upon an indissoluble relationship between society and the individual, in consequence of which both the good and the evil which affect the individual, in his property or his power of creating property, enter into and go to make up the condition of the whole. Every mem-

ber of the community is commercially as well as morally interested in the preservation of every other member's possessions, and in the conservation of his ability to carry on productive industry for the creation of property, and since this is the special office of insurance, it is fair to represent that the cost of insurance to each man is the tax which he pays in accordance with natural law, as his share of the expense of maintaining a healthful commercial equilibrium. As extreme cases are the best for illustrating principles, reference is legitimate, in this connection, to instances well-known and of common occurrence. Take, as an example, the successful manufacturer, who by practical industry has acquired both the talent and the means necessary for the development and direction of a great amount of skilled labor, which, without precisely such guiding superintendency as he is able to exercise, would be of little public utility, for want of organized employment. Working with his own hands and with small means at the outset, he has acquired a skill in workmanship, and a power of making labor conducive to wealth, which have raised him from the condition of an individual laborer, to the position of one who is competent to make the labors of many directly serviceable to public advantage. His business has expanded itself from year to year, until hundreds of skilled workmen, organized and appropriated to special departments, according to their several abilities, are made able to turn out perhaps tenfold more of valuable production, than they would have done if they had acted only in individual capacities, and without the facilities afforded them in a thoroughly furnished and well specialized system of labor. But in a brief hour, all the products of his years of toil are reduced to ashes. If he has lost his all by the conflagration he is impoverished, and will be unable to restore the buildings, the machinery and materials which are necessary for continuing the business on its former scale, and he is forced back into a narrower and less productive sphere of action. But if he has provided for the emergency by a policy of insurance, there will be no need of this. By the avails of his insurance, he immediately reinstates his business on a scale commensurate with the ability of productive economy, which had been acquired by years of experience, and the interruption which had occurred leaves scarcely any traces of its existence. Instances of this kind afford striking examples of the ease and certainty with which the action of the law of community of loss, or social distribution avails to render what otherwise would be a great commercial disaster comparatively harmless. They further demonstrate the practicability of saving to society the invaluable benefit of conserved

industrial power, by so simple a method as that of distributing the burden of loss among the many.

Although few persons are in the supposed situation of producers on an extensive scale, yet the principle illustrated by the instance cited is of universal application, even to the case of the humblest laborer, whose scanty subsistence is the product of daily toil. In the majority of cases, losses by fire and accident produce no sensible disturbance in the state of trade, but if we notice the reports of any insurance department, we shall see that the losses of a year, each, small, in itself considered, amount, in the aggregate, to millions of money, and in the light of the facts set forth in these public documents, one cannot fail to be impressed with surprise and wonder at the effectual working of insurance as a conserving and reinstating agency, under losses which detract so largely from the annual production of the country.

When men are pecuniarily disabled, and the enterprises in which they are engaged flag for lack of means of expansion commensurate with their productive ability, society suffers loss, and there at once arises the demand for individual reinstatement. If reinstatement is immediately effected, which is the true intent of insurance, all the wealth-producing talent which was in danger of being practically annihilated, by being thrown out of its proper sphere of employment, is brought back to its former condition, and the course of profitable industry goes on with but slight interruption. But if reinstatement be impossible, or has not been provided for, the consequences are inevitable. An incalculable amount of public wealth is lost beyond recovery, by the practical annihilation of wealth-producing power in the state of disorganization that ensues.

The extent to which this annihilating of productive power would go on, in the absence of remedial insurance, and the amount of loss which the public wealth would suffer in consequence, can be judged of only by considering the frequency with which disasters occur, and reckoning the total value of the property destroyed as the index of the value of the labor necessary for its reproduction, and how much of this value would be subtracted from efficient use for want of capital if it were not saved from extinction by this method of relief.

The conservation of producing power in the individual is, therefore, an essential element of public economy ; and the insurance company by whose agency this important service is rendered becomes by this means an indispensable auxiliary to general prosperity. Even the religious law of charity is enforced by the consideration that charity bestowed

so as to help the needy to become producers and self-supporters is a true economy—there is, that scattereth and yet increaseth, and there is that withholdeth more than is meet, and it tendeth to poverty. A timely bestowment upon one who is disabled by sickness or other calamity, from using his wealth-producing power, is a profitable outlay; the withholding of it perpetuates individual disability, and tends to the common impoverishment. Without regarding the insurance company as in any sense an eleemosynary institution, it is still true that the same law of reinstatement prevails in this as in the case where a needful charity restores a sick man to health or one depressed by poverty and want of food and household comfort, to conditions in which his productive power shall be equal to his necessity. The action in both cases is restoration of that which, for the time being, is lost or rendered unavailable, and its conservation for further useful effect. It is a high and distinguished function which the insurance company alone can effectually execute.

These considerations generalized, with some modifications in the statement of them, apply with as much force to the insurance of life as to those other forms of insurance which, for convenience of treatment, have been distinctly specified. Every person's life is supposed to have some wealth-producing value to his family or to society or to both. The fact that some men are rendered worthless by their idleness or vices, or by misdirection of industrial ability, does not take away from the truth of the proposition. If, then, a man expends the proceeds of his labor wisely, or lays up his surplus profit as a reserved fund against the time of his death, what he then leaves becomes, in the hands of his survivors, and through them, the means of conserving and perpetuating the benefits of his industrial action while he lived. Those who share his estate, if they are able and disposed to employ it well, may go forth into the world with augmented facilities for making themselves large and valuable contributors to the public prosperity. The same effect occurs when a man invests a portion of his income in a life insurance purchase. When death robs the world of the benefit of his producing power, the present value of at least a portion of it, represented by his insurance, is perpetuated to his survivors, in whose hands, by reason of their augmented ability of useful enterprise, the amount of annual production that was cut short, may be reproduced and saved as a perpetual and self-perpetuating contribution to the national wealth, through a series of years at least equal to the natural period of his single life.

Considerations of this character inevitably lead to the conclusion



that insurance, aside from the relief which it brings to individuals in the exigencies of trouble, is founded upon the broadest principles of social economy, and is a valuable auxiliary to wealth-production in all civilized communities—an institution that deserves the support of the best managerial and financial talent which the country affords.

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#### CASES REPORTED.

A full report of the decisions in eight cases is given this month.

In *Mickey vs. The Burlington Ins. Co.*, the principal question at issue related to the effect of a warranty in the application that the insured would keep his stoves and pipes well secured. The insured took down the pipe with the intention of removing the stove for the summer, and left the stove standing, in which a fire was afterwards carelessly built, which resulted in the destruction of the house. The court held, Judge Miller dissenting, that the warranty did not apply, and that the company was liable for the loss. The court also held that, if the insured delayed bringing his suit until after the time limited in the policy, in consequence of inducements held out by the company's officers, causing him to believe that the loss would be paid without suit, that would operate to remove the bar created by the condition of the policy. The case was decided in the Supreme Court of Iowa.

*Bodine et al vs. The Exchange Fire Ins. Co.*, of the city of New York, was decided in the Commission of Appeals of New York. The court held that the company could waive by parol, a written condition in the policy that no insurance should be considered binding until the actual payment of the policy and that this waiver could be made by the agents of the company. It was also held that the maxim of *delegatus non potest delegare* does not apply in the case of an insurance agent, and that an agent's clerk can bind the company as effectually as the agent himself. The judgment of the lower court against the company was affirmed.

In *The Illinois Mut. Fire Ins. Co. vs. Stanton*, the Supreme Court of Illinois held that insurance agents will be held to have such power as the company knowingly permits them to exercise, and that the fact that the company ratifies the acts of its agent, is evidence of authority in the agent. The court also held that a person insuring in the company and paying a definite sum of money in lieu of a premium note, did not become a member of the company, and that the law im-

posed upon him no higher or greater duties than if he had insured in a stock company, and also that a provision that the policy should be void in case of any change of title, was inserted for the benefit of the company, and that the company could waive the condition. There were several other points of interest involved in the case.

The Supreme Court of Vermont, in *Patch and Wife vs. The Phoenix Mut. Ins. Co.*, decide that an entry made upon the margin of a policy is a part of the policy the same as though inserted in the body of the instrument. The court also held that a paid-up policy, received on surrender of an endowment policy, was forfeited on failure to pay the interest on two notes, given as part premium on the first policy, the payment of which interest was made a condition of the second policy.

In the cases of *Fernandez et al. vs. The Great Western Ins. Co.* and the same parties against *The New York Mutual Ins. Co.*, the judgment of the lower court, against the companies, was reversed, Ch. Com. Lott and Com. Hunt each giving an opinion. Several interesting questions arose in regard to deviation and reasonable time for departure. The insurance was upon the vessel "at and from New York to Havana." The court held that a trip made to a neighboring port for the purpose of procuring coal, was a deviation, and that there was not, as claimed, a division or apportionment of the insurance, one portion for the time of her stay at New York, and the other for the time after her departure. Commissioner Hunt reviews the rule laid down by Parsons, in regard to temporary variations, and holds that the rule is only true as to time policies, and never as to voyage policies.

*Snow et al. vs. The Columbian Ins. Co.*, was a marine case, decided in the Commission of Appeals of New York. The policy contained a warranty that the vessel should not use certain ports, during certain seasons of the year. The vessel was lost while on her way to one of the forbidden ports, during the forbidden season of the year. The court held that sailing towards a port, is not in any sense of the term "to use" it; and that a mere intention to violate a policy can never have the effect of an actual violation. The judgment of the General Term was reversed, and judgment ordered for plaintiffs.

In the *Pacific Ins. Co. vs. Guse*, a case decided in the Supreme Court of Missouri, the question at issue related to the application of the statute law to an assessment upon a premium note. The court held that a copy of the resolution of the board of directors, by which an assessment was levied on all premium notes, was admissible in ev-

idence. It was also held that the maker of the note was not liable upon the mere assessment of the directors, but that there must have been actual losses or expenses before he was liable, and that the company must show the necessity of the assessment.

In the case of *Reynolds vs. The Commerce Fire Ins. Co. of New York*, decided in the same court, the questions related to the character of the property insured under the classification of the hazards in the policy, and the effect and extent of a notice to the company's agent. The court lay it down as a rule that equivocal language in a policy, especially if calculated to mislead the insured, must be construed most strongly against those using the language and issuing the policy. Judgment in favor of the plaintiffs was affirmed.

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[From the Chronicle.]

#### IN WHAT DOES THE SECURITY OF FIRE INSURANCE CONSIST?

One thing is plain. It does not consist in financial guarantees. The meagre ratio which the capital employed in the business bears to the vast aggregate of wealth which, in the shape of goods, buildings, factories, warehouses and ships, is dependent upon it for indemnity in case of fire, is conclusive upon this point. The aggregate sum insured by the joint stock insurance companies doing business in this State was, on January 1st, 1872, no less than \$4,062,829,746. The total assets of the same companies, pledged for the protection of this enormous aggregate of values were, at the same date, \$77,586,349.42. It is evident that the security of the insured does not depend upon the \$77,576,340.42. The ratio which this bears to the whole amount at risk is so trifling and insignificant, that if even four per cent. of the latter should be destroyed within the next twelve months, bankruptcy would overtake every insurance company in the country, and beggary very many of the insured.

*It is upon the sufficiency of the premium that the security of the insured almost entirely depends.* Past experience shows that never less than 60 per cent. of the premiums received has been required to pay current losses; in exceptional years, the entire premiums do not suffice, while at more or less distant intervals a disaster, like that of Portland or Chicago, sweeps the board of all capital pledged and all the assets accumulated during many years of comparative plenty.

If, therefore, risks are taken at less than an adequate premium, it is done at the peril not of the insurer, but of the insured. Cheap

insurance is a fraud, and a fraud of the most dangerous kind. The applicant may suppose that, if he can succeed in obtaining a reduction from the regular rates, it is so much money *in* his pocket, the truth is, that it is so much, and many fold more, *out* of it. The reduction is made, if made at all, at his peril. He has more at stake in the solvency and permanency of the company than any of its officers or directors possibly can have. With them, if the company fail, it is but the loss of a single venture; with him, it is the loss of all—home or warehouse, or business prospects, the dearly bought product of a lifetime's labor. The insignificant difference upon which all this depends, is a matter of astonishment. Often it is only the difference between .95 and one per cent., so close and sharp is the pressure of competition.

We say, therefore, to the applicant for fire insurance, money is not your security, nor good names, nor honesty of purpose. Your only security is prudence of management and adequate rates. Fire insurance is no more guess-work than merchandising or commerce, or the simplest operations of mathematics. It is founded upon the ascertained facts of experience, and it demands of you adequate remuneration for the security which it offers, not as a speculation but as a necessity; not to enrich the management, but *to protect you*. If you buy cheap insurance, you will also buy dear experience. The company cannot lose by taking your risk, unless you are the greater loser. Every dollar you think to gain by reducing its income, reduces your chances of indemnity in case of loss. Such are the compensations of fire underwriting.

The act of taking out a policy of insurance differs from any other purchase only in the danger of mistaking the nature of the article purchased. What is bought is, so much of the ability of the company to pay the losses insured against as may be necessary to make good our individual loss. That ability depends solely upon the sufficiency of the company's receipts from our own and other such purchases. If for the security of the insured it were necessary to match every dollar at risk with a dollar of assets, it would require the whole capital of the country to insure the property of the country. But as no one year will witness the destruction of all the perishable property of the country, but only of a certain percentage thereof, so no one year requires for the purposes of insurance but a certain percentage of the capital of the country. Unfortunately, in the business of fire insurance, we are not able to foretell exactly what that necessary percentage will be. But we are able to determine it approximately, and to distribute

it in varying proportions upon the various kinds of property insured, according to the greater or less hazard to which they are exposed. If, however, the underwriter fails to receive a percentage of premium sufficient'y high, it will be impossible to meet the losses accruing, and the money which has been paid him will have been lost to the insured. The interests of all parties to the contract are identical. If the insurer fixes the rate too high, the better class of risks will not be insured, and no rate is sufficient to meet the losses upon certain classes of physical and moral hazards. If, on the other hand, rates are fixed too low, all will insure, though but the few who are the first to suffer loss will realize any benefit from their insurance.

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#### THE BOSTON FIRE.

On Saturday evening, November 9th, 1872, a fire broke out in the city of Boston, which, in its extent and destructiveness, was only second to the great Chicago fire of October 9th, 1871.

The alarm was first given about fifteen minutes past seven o'clock, when the flames were observed bursting forth from a building on the corner of Sumner and Kingston streets, occupied as a wholesale dry goods store, by Tibbits, Baldwin & Davis. The fire originated in the engine room, and was caused by raking the fire out of the furnace on closing up the store for the night. From the engine room the flames passed up the open space at the elevator, until they reached the Mansard roof, and from thence were communicated to the Mansard roofs of other buildings on the opposite side of Sumner street, when the conflagration became general, extending from building to building, by means of the Mansard roofs, with which they were surmounted.

The horses of the fire department and of the city were sick with the prevailing disease, and many of the engines were drawn to the fire by men, so that it was nearly half an hour before any exertions were made to check the flames, and by that time the fire was beyond control, and raged unchecked till about one o'clock the next day, and until that portion of the city extending from Washington street, on the west, to the harbor, on the east, and from Milk street, on the north, to Bedford street, on the south, was in ruins. This territory covers an extent of about sixty acres, and within it almost the entire wholesale boot, shoe and leather, wool, and dry good business of the city was carried on. Not a single wholesale boot and shoe store was left. In no great fire of modern times has so vast an amount of property been consumed on an equal extent of territory. Seven

hundred and forty-eight buildings were destroyed, including whole streets that had been recently rebuilt, mostly of granite, and, with the exception of the wooden roofs, in the most substantial manner. Many of the stores and warehouses were crowded with goods to an unusual extent, on account of the difficulty of shipping, due to the sickness of the horses. Between 8,000,000 and 9,000,000 pounds of wool were consumed, and many thousand tons of coal were burned at the wharves. The lowest estimate of the loss by this fire, is about \$100,000,000. The buildings destroyed were assessed in the city tax books, at \$7,765,000, which was probably not more than two-thirds of their real value. The total amount of insurance upon the buildings and property destroyed, is estimated at \$48,572,800, of which \$29,-710,000 was in Massachusetts companies.

The occasion and extent of this great fire, unaccompanied, as it was, by any considerable wind, must be accounted for by the large, combustible wooden roofs upon the lofty buildings; the narrow and crooked streets, and the tardy arrival of the firemen and engines, due, to a great extent, to the sickness and disability of the horses, but partly to the imperfect character and organization of the fire department of that city.

### EDITORIAL ITEMS.

We shall be under obligation to the officers and agents of insurance companies and to members of the legal profession and others, for any information in regard to insurance cases that may come before the courts. While we rely upon our regular arrangements with clerks and reporters for the decisions rendered in the higher courts, the opinions of the judges, as well as the records and the briefs of counsel, are necessarily confined to the legal issues raised on the trial, and it sometimes happens, as in several cases reported in this journal during the past year, that through the fault of the parties or their attorneys, the real merits of the case do not appear. We are, moreover, necessarily compelled to rely upon our friends and our exchanges for facts relating to cases of interest in the lower courts.

Any information of whatever character,

which may be supposed to be of value to us will be thankfully received. Persons sending information in regard to cases arising or decided in any court, will please state carefully the facts in the case, with the date and the name of the court.

### BOOKS RECEIVED.

EXCHANGES.—We are in receipt of the following exchanges:

#### INSURANCE.

Baltimore Underwriter.  
Insurance Times.  
Insurance Monitor.  
The Underwriter—Philadelphia.  
The Spectator.  
Western Insurance Review.  
The Chronicle.  
The Herald.  
Insurance Index.  
Coast Review.

The Avalanche.  
 The Northwestern Review.  
 The New York Underwriter.  
 Post Magazine—London.  
 The Insurance Agent—London.

## LEGAL.

Albany Law Journal.  
 The American Law Times.  
 Pacific Law Reporter.  
 Chicago Legal News.  
 Bench and Bar.  
 American Law Register  
 Western Jurist.  
 Legal Gazette.  
 The Lancaster Bar.  
 The Legal Opinion.  
 The Law News—St. Louis.  
 Pittsburgh Legal Journal.  
 The Luzerne Legal Register.  
 National Bankruptcy Register.  
 The United States Jurist.  
 Southern Law Review  
 The Law Journal—London.

Journal of Speculative Philosophy.  
 New York Mercantile Journal.  
 The Industrial Monthly.  
 The Trade Journal.  
 St. Louis Weekly Railway Register.  
 New York Independent.

THE LAW NEWS is the name of a new legal paper published weekly at St. Louis, by Benjamin Hunter, Esq. The *News* proposes to give all the decisions of the Supreme Court of Missouri, in advance of the Reports, and as soon as rendered, with such other matters as are of interest and importance to the profession. The appearance of the first numbers is in every way creditable. Such a journal is needed in Missouri, and we trust it will have abundant prosperity. The subscription price is only \$3.00 per annum.

INSURANCE REPORT.—“First Annual Report of the Insurance Commissioner of Maryland to the Comptroller of the Treasury Department, December 1st, 1872.” Charles A. Wailes, Commissioner.

INSURANCE REPORT.—“Third Annual Report of the Superintendent Insurance Department, State of Missouri, 1872; Part II; Life Insurance Companies.” Charles E. King, Deputy Superintendent.

## MISCELLANEOUS.

## THE CORRECT DATA FOR THE VALUATION OF LIFE INSURANCE POLICIES.

We take the following extract from the report of Mr Nathan Willey, Actuary of the Insurance Department of Ohio, to Hon. Wm. F. Church, Superintendent of the Department:

The laws of Ohio provide that the Superintendent of Insurance “shall make or cause to be made net valuations of all outstanding policies” of the companies operating in this State, according to a certain table of mortality and rate of interest. The obvious intent of this law is to protect the policy-holders and keep the companies solvent. It is a well-established maxim, that all laws should be so interpreted that the original intention of the law-makers may be carried out and not frustrated, and therefore the liabilities of a life insurance company should be determined in such a manner that the policy-holders may be protected by a sufficient reserve.

I admit that it is well settled in law that the obligations of the company to the policy-holder are to be determined strictly by the letter of the policy, but I deny that this Department is obliged to rely wholly upon the wording of that part of the contract called the “policy,” in order to find the data for a correct valuation. This Insurance Department must make a *true valuation* according to the *actual facts* in the case, and if it does not find these facts correctly stated in the policy, it must take them where it can find them. The contract for insurance consists of two parts—the application and the policy; the latter may be changed and altered an indefinite number of times, while the former remains the same; but in all changes and mutations, the application is always ro-

ferred to as the basis upon which the policy is issued.

The relations between the policy-holder and the company are not the same as between the company and this Department. In the former case there is a mutual bargain, and both parties agree upon such terms as they choose. But in the latter there is no option. Neither the policy-holder nor the company can say how a policy shall be valued, or what data shall be taken. The law is mandatory, and this Department must take the whole contract of insurance as it is, and give the result. I also claim that this Department has the power to decide upon the correctness of any data for valuation, when there is any discrepancy between the terms of the policy and of the application. If there is a collusion between the company and the policy-holder in the data of a policy, to escape the just requirements of the law, or if there is deceit on the one side and ignorance on the other, so that a legal responsibility is sought to be avoided, has this Department no power to carry out the true intent of the law? Suppose by a collusion between the policy-holders and the company, the ages of all the insured had been written as being twenty years, or that the policies had all been dated in 1872, instead of from one to six years earlier, when the same contracts, as far as relates to valuation, were originally made; would this department have been obliged to accept this data as final? Could it not go to the original applications, or elsewhere to find the true data? I do not think it is the intent and meaning of the law that the companies should have the power to compel the publication of a false or incorrect statement of their condition.

The law requires that the company shall hold a certain reserve on every contract for insurance, as long as it is in force, and the mere change of date and age in a policy on the life of a person, as the years pass by, does not alter the essence of the contract between the policy-holder and the company, and still less does it relieve the company from any liability which it has once incurred. When the Insurance Department has once declared what is the legal liability on a policy, neither the com-

pany nor the policy-holder has any power to cancel that liability, as long as the mutual relations between them remain the same. If a company, by simply changing the dates and ages in a policy, while the contract for insurance is substantially the same, can get out of one-half or three-fourths of its liabilities, what reliance can be placed on a State valuation.

A policy may be changed in some particulars which affect the policy-holder; restrictions of travel may be removed; it may be made payable to a different party, but as long as the premium remains the same, and it is based on the same application, none of these alterations affect the reserve which this State requires the company to maintain, even though a new date and number may be given to it and another age expressed in it, and it is not for the company or the policy-holder to say whether such an alteration does or does not affect the reserve.

To obtain the correct data for valuation, this Department must refer to the original application, on which the contract for insurance is based. The company does this in every instance where there is any question whether the applicant made true or false representations to obtain his insurance. The courts do this in all cases of contested claims, and this Department, being created by the laws of this State, has or should have the same privilege. Nay, it cannot do otherwise, for in no policy is there any averment as to the age of the policy-holder, only a memorandum in the margin, nor does the date of the policy contain any averment that the liability commenced at that time, and therefore for all the purposes of a correct valuation the instrument called the policy is practically worthless. To find the true data, the terms of the whole contract, the application and the policy, must be considered, and if there is any discrepancy between them, it is for this Department to decide which is correct.

#### THE NINTH CENSUS.

We take the following from an article in the *Insurance Monitor*. Speaking of the facts shown by the census report, it says:—



Fifty-three out of every hundred deaths reported were male, which is chiefly due to the preponderance of this sex from immigration and other causes. Such a preponderance is exhibited in all those States, which are increasing in population from this source, and especially in the mining districts, which are chiefly occupied by the male sex; while in several of the New England and Southern States, which are being depleted from the same cause, the reverse is the case.

The most interesting feature of the report is the distribution of the deaths among the ages, of which the following is a summary:

Ages.	Deaths.	Ages.	Deaths
0-4	20,213	50-54	16,123
5-9	26,329	55-59	13,246
10-14	15,979	60-64	15,883
15-19	20,272	65-69	14,459
20-24	25,968	70-74	14,619
25-29	22,522	75-79	11,602
30-34	19,528	80-84	9,592
35-39	20,060	85-89	4,537
40-44	17,836	90-94	1,983
45-49	16,135	95 and over	1,127

The causes of death, too, are a feature in the census returns, hardly second in importance to the distribution by ages. Consumption, that scourge of our climate, presents, of course, the most fearful array, being about one in seven of all the deaths, or excluding the mortality of childhood and youth, about one in three of all those who reach the age when its ravages begin. Its twin-brother, pneumonia, comes next, in order carrying off about 8 in every hundred; so that these two kindred diseases account for nearly half of the deaths occurring during the mature years.

After these, in order, follow enteric and scarlet fevers, cholera infantum, diarrhoea and inflammation of the brain, the prevalence of the latter testifying to the wear and tear of American business life. The following table will show the percentages of some of the principal disorders:—

	Pr ct.
Consumption, . . . . .	11.2
Pneumonia, . . . . .	8.2
Enteric Fever, . . . . .	4.5
Scarlet Fever, . . . . .	4.1

Cholera Infantum, . . . . .	4.1
Diarrhoea, . . . . .	2.9
Inflammation of the Brain, . . . . .	2.8
Convulsions, . . . . .	2.6
Debility, . . . . .	2.3

But what will surprise most of our readers is, that the cause of death, more prolific than any, except the two first, is accidents, of which no less than 22,740 are reported, being a percentage of 4.62 of the whole. 1,582 of these were the result of railroad accidents, 1,465 were suicides, and 2,057 were homicides. Explosions killed 290, drowning, 4,075, and burns and scalds, 3,301. From all of these causes, except the latter, the males were the principal sufferers, on account of their greater exposure.

#### INSURANCE LAWS OF OHIO.

ACCORDING to the *Insurance Index*, the bill entitled "An Act to Regulate Insurance Companies doing an Insurance Business in the State of Ohio," which was published as having passed the two houses of the General Assembly of that State, on the 27th of last April, and as having become a law, is no law at all, for the reason that it passed the Senate and the house in different forms. In its passage through the house, the original bill was so amended that "July, A. D. 1869," read "January, A. D. 1872." By some mistake, this amendment was not inserted in the bill as it passed the Senate. The question is, whether this mistake nullifies the whole Act.

#### THE MUTUAL LIFE OF NEW YORK—REDUCTION OF RATES.

Great surprise and excitement has been caused in the life insurance world, by the recent action of the officers and directors of the Mutual Life Insurance Company of New York. The President of this company, early last month, addressed a circular to the public, which, with an accompanying letter from the actuary of the company, to the directors, has been extensively published in the daily papers throughout the country. In this circular it is announced that the Mutual Life will

hereafter, as soon as necessary preparations are made, issue policies upon the basis of a ten per cent. loading, or addition for ordinary expenses, instead of forty, the amount heretofore charged. This amounts to a reduction of about twenty-two per cent. on the premiums for life policies and ten or eleven per cent. on the premiums for endowment policies. This announcement has called forth the earnest protest of other life insurance companies and of a large number of the policy-holders of the Mutual Life. The proposed reduction of rates is universally condemned by the insurance journals as an unwise and dangerous experiment. At a meeting of the directors of the company on the 14th ult., it was decided that the proposed change should not take effect until further action of that body. The present indications are, that the officers and directors will be forced to abandon their project.

#### THE NATIONAL INSURANCE CONVENTION.

The National Insurance Convention held its third annual meeting in New York, in October. The attendance was quite small, and the meeting almost a failure. The principle thing accomplished was an improvement in the form of blanks for the statements and returns of insurance companies. After a session of three days, the Convention adjourned to meet at Boston, on the third Wednesday of September, 1873. The officers for the ensuing year are: President, Hon. Llewellyn Breese, Secretary of State of Wisconsin; Vice President, Hon. J. W. Foard, Insurance Commissioner of California; Secretary, Hon. Oliver Pillsbury, Insurance Commissioner of New Hampshire.

#### ITEMS.

A MEMORIAL has been presented to the Attorney General of England, signed by 21,000 gentlemen, bankers, merchants and tradesmen, against the proposed abolition of imprisonment for debt. It was stated

that last year only 6,000 persons were actually imprisoned by county judges, and many of them, as soon as they reached the jail, paid their debts.

HON. James Thompson, for a long time Chief Justice of the Supreme Court of Pennsylvania, has retired from the bench by the expiration of his term. He is succeeded by Hon. Ulysses Mercer, of Tonawanda.

THE New Jersey Mutual Life Ins. Co. has re-insured in the Hope Mutual Life Ins. Co., of New York, and retires from business.

SIR Roundell Palmer has been appointed Lord Chancellor of Great Britain.

HON. Orlow W. Chapman has been appointed Superintendent of Insurance for New York, by Gov. Hoffman, and the appointment has been unanimously confirmed by the Senate. Mr. Chapman is from Binghamton, a lawyer by profession, a native of Connecticut, and a graduate of Union college. He was a member of the State Senate in 1870-71. He has had no special experience in insurance.

THE Anchor Life Insurance Company has transferred its risks to the St. Louis Mutual

THE President has appointed Hon. Ward Hunt, of Utica, New York, to fill the vacancy caused by the resignation of Mr. Justice Nelson, of the United States Supreme Court. At the time of his appointment, Mr. Hunt was one of the Commissioners of the New York Commission of Appeals.

HON. Thomas Settle has been appointed Associate Justice of the Supreme Court of North Carolina, to fill the vacancy occasioned by the resignation of Hon. H. P. Dick.

## CURRENT TOPICS.

—Mr. Willey, actuary of the Ohio Insurance Department, is in Chicago, investigating the condition of the Protection Life Insurance Company. This is the company whose president, not long since, found the questions of Mr. Harvey, actuary of the Missouri Department, a little too searching, and not only refused to answer further, but managed to capture and retain Mr. Harvey's papers, containing the statements he had already made.

—The committee appointed by the Legislature of Connecticut to make an investigation of the alleged discrepancies between the amounts of assets returned for taxation, and the amounts reported to the State Insurance Departments, by the Hartford Life Companies, reported:—"That the four companies whose proceedings were under review, in the years 1867, 1868, 1869 and 1870, omitted from their statements to the comptroller, items which ought to have been included therein, amounting in the aggregate to the sum of \$3,226,665.99. Three of the companies in their statements, reported their investments at the cost, when they should have reported them at the amount standing upon their books on the first day of October, each year. It is impossible for the committee to state the amount of the difference between the two valuations, but during the four years ending the 1st of October 1870, it cannot, in the opinion of the committee, have been less than \$1,600,000."

—We are glad to see that our friends, SOULE, THOMAS & WENTWORTH, successors to the widely and well known firm of Soule, Thomas & Winsor, of St. Louis, have moved into the large and elegant store, No. 219 North Fifth street. They have now ample room to display their large stock of Law Books, and to accommodate their customers, who come from all parts of the West. In three years the firm has developed a business which already extends over twenty different States, and is still growing.

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—The stock plan in life insurance seems to be gaining new adherents from month to month. This is an evidence of the growing demand on the part of the people for "a maximum insurance for a minimum premium." The MOUND CITY LIFE has recently increased its capital to \$500,000 for the purpose of doing a stock business in the future, and is, we understand, meeting with that success which the worth of the company deserves. A good strong stock company is what St. Louis needs, and we are glad to see the step taken by the Mound City.

—John W. Godfrey, Esq., has been appointed General Manager and Superintendent of the Brooklyn Life Insurance Company, for their department west of the Mississippi, and in the States of Illinois and Wisconsin. The Brooklyn has been doing business in Missouri for nearly eight years, during which time the fairness and equity of their dealings, the economy of their management, and their promptness in settling losses, have gained the confidence of the community. The company is in excellent financial condition, and its assets, as shown by the State department, are in actual possession, and of full cash value.

—The estimated value of vessels belonging to or trading at ports in the United States, reported totally lost or missing during the six months ending July 31st, is \$4,990,000. The greatest loss was experienced in February, when \$1,280,000 worth of this kind of property was swept away. The value of shipping lost during the corresponding months of 1871 was \$5,013,000.—*Spectator*.

—Our insurance companies are beginning to discover that, in sections of country at a distance from the home office, at least, a company is judged as much by the man it has to represent it, as by any influence or reputation the company or its officers may possess. The changes that have for some time been going on in the business of insurance, and the increasing powers and responsibilities that recent adjudications of our courts have placed upon the insurance agent, also renders it of the first importance that companies select

only first class men to represent them. We congratulate the Brooklyn Life upon its good fortune in securing the services of John W. Godfrey, Esq. We are glad to learn that Mr. Godfrey has recovered his health, and that he is to be connected with so good a company as the Brooklyn, and in so important a field as that to which he has been appointed.

—The bill to establish an Insurance Department in Georgia was rejected by the Legislature of that State just before its recent adjournment.

—William Hanley, Esq., Secretary of the Life Association, died at St. Louis on the 17th of November. Mr. Hanley was a brother-in-law of J. Thompson Corder, better known as John P. Thompson, the originator of the Association, and its first secretary, and had been connected with the company from an early period in its history. Mr. Hanley had the respect and esteem of all who knew him.

—Horace Greeley's life is said to have been insured for \$100,000 for the benefit of the *Tribune* Association.

—The executor of the Colvocoresses estate has brought suit against the Phoenix, New York, Mutual, Metropolitan and Connecticut Mutual Life Insurance companies, upon the policies in those companies.

—The *Western Insurance Review* enters upon its sixth volume in a new dress, and greatly improved appearance. The Legal Department of the *Review* is especially valuable.

—The Mutual Life of Chicago is erecting a fine building in that city, on Fifth avenue, between Washington and Randolph streets. The office of the company will be located in the building as soon as it is completed.

—Hon. Geo. W. Mowe, for several years and until recently, Insurance Commissioner of California, died at Sacramento, October 30.

—One Passmore recently obtained a verdict for \$4,000 in the District Court at

Philadelphia, against the Union Telegraph Company, for a negligent error in the transmission of a telegram, whereby the plaintiff lost an opportunity to sell a tract of land in West Virginia.

—The United States Supreme Court completed its adjourned term Nov. 27th. The regular Annual Term began Dec. 2d. At the adjourned term about one hundred cases were heard and decided. The business of the court is now about two years in arrears.

—Walter S. Griffith, Esq., President of the Home Life Insurance Company, died in Brooklyn, Nov. 25th. Mr. Griffith was one of the founders of the company, and had been its President since its foundation.

—Sir John Duke Coleridge, Attorney-General of Great Britain, in the course of an address before the liberal association of the city of Exeter, speaking of the result of the Geneva arbitration, said that England had got well out of a bad business.

—The last Legislature of Pennsylvania passed 1,145 laws, of which number only 48 were public.

—Ex-judge Curtis, the senior counsel for Mrs. Fair, is said to have received the sum of \$8,000 for his services.

—George C. Ripley, Esq., for many years secretary of the Home Life Insurance Company, has been elected president of the company, to fill the vacancy caused by the death of Walter S. Griffith, Esq. William J. Coffin, the former actuary of the company, has been elected secretary.

The effect of the Ohio law, requiring all life companies doing business in that State, to have not less than \$200,000 capital, will be to drive away about thirty companies now doing business there.

—Among other testimonials presented to General Meade by his friends, in 1868, was a paid up life insurance policy for \$10,000.

—A California editor has bought a mule, and a brother editor chronicles it as a remarkable instance of self-possession.

THE  
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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

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*From certified transcripts in our possession.*

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AGENT.

§ 16. FIRE.—*Authority of—Notice to.*—The policy contained a condition that if the property insured should become alienated, or the title in any manner changed, the company should not be liable for any loss or damage that should happen, unless the policy should have been duly assigned or confirmed by consent of the directors to the actual owner or owners thereof previous to the loss or damage, and that no policy should be deemed to be duly assigned or confirmed unless the consent was certified on the policy by the secretary of the company. The parties in interest informed the local agents of the company, before the consummation of the sale, that they were about to make a transfer, and asked their advice as to the best course to be pursued in reference to the policy. The agents answered that the policy would be good until it could be procured from St. Louis, and the formal consent of the company entered upon it.

It had been the custom of the agents to give such consent, and their acts had always been ratified by the company. Before the policy was received, and any formal consent entered thereon, the property was destroyed by fire. *Held*, that in giving such consent, the local agents were acting within the scope of their authority, and that "such agents will be held to have such power as the company knowingly permit them to exercise, and the fact that the company ratify such acts, on the part of their agents, will be regarded as evidence of that authority in the agents." *Held*, also, that notice to the agents must be re-regarded as notice to the company.

*Illinois Mutual Fire Ins. Co. vs. Stanton.\**

Rep'd Jour'l, p. 29.

ILL. S. C.

### CONSTRUCTION,

§ 17. FIRE.—"*Stoves and Pipes well secured*"—*Warranty*.—By a stipulation in the policy, the application was made a part of that instrument, with a warranty, on the part of the insured. The application contained the following interrogatory and answer, "Are your chimneys, fire-places, fire-boards, stoves and pipes all well secured, and will you engage to keep them so?" Answer, "Yes." The pipe of a stove, used in the house, passed through the floor of a chamber and thence with an elbow into a flue in the wall. The wife of the insured, intending to remove the stove, took down the pipe in the chamber, and placed a bed over the hole in the floor, through which it had passed, but neglected to remove the stove. A few days after, forgetting that the pipe had been removed, she caused a fire to be built in the stove. As the result the fire was communicated to the bed, and the house was consumed. *Held*, that "this covenant bound plaintiff to keep the pipe 'well secured.' He was obliged thereby to keep it in such condition, and to exercise toward it such care as a man of ordinary prudence would exercise for the protection of his property. The defendant was protected by this covenant from the effects of defective pipes and stoves. It did not bind plaintiff to keep them always up or constantly in use." "The undertaking of plaintiff to keep the stoves and pipe se-

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\* Decision rendered Jan. 22nd, 1872.

cured must be applied to the subject and time within the contemplation of the parties."

*Peterson vs. The Miss. Valley Ins. Co.*, 24 Iowa, 494; *Loud vs. Citizens' Mut. Ins. Co.*, 2 Gray, 221; *Sayles vs. N. Western Ins. Co.*, 2 Curtis C. C., 610; *Turley vs. N. A. Fire Ins. Co.*, 25 Wend., 374; *Townsend vs. W. W. Ins. Co.*, 18 N. Y., 168; *Gloucester M'fg Co. vs. Howard Fire Ins. Co.*, 5 Gray, 497; *Troy F. Ins. Co. vs. Carpenter*, 4 Wis., 20; *Gates vs. Madison Co. Mut. Ins. Co.*, 1 Seld., 469; *Hide vs. Bruce*, 3 Doug., 213; *Dobson vs. Southby*, 1 Moody & Malkin, 90.

*Held*, also, that "plaintiff's warranty did not forbid the temporary removal of the pipe at a time the stove was not in use, such restriction not being within the contemplation of the parties." *Held*, also, that a negligent attempt was made to use the stove. From this the loss of the property resulted, and the company is liable for the loss.

*Mickey vs. The Burlington Ins. Co.\**

Rep'd Jour'l p. 15.

Iowa S. C.

## CONTRACT.

§ 18. *LIFE.—When Operative—Impossibility of Performance—By Act of God or Law.*—The defendants, a corporation created by the laws of New Jersey, issued, before the late civil war, a policy for the benefit of the plaintiffs, upon the life of their father. The policy contained a provision that in case the annual premiums were not paid, on or before the specified days, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine, and that all previous payments should be forfeited. The plaintiffs and their father were, and continued to be, citizens and residents of Virginia. The payment of the annual premiums was intermitted during the civil war, and the life insured terminated during the intermission of payment. *Held*, that "whether a contract is to be operative, in the event of performance becoming impossible, is a question as to the intention of the parties." *Held*, also, that "the exact performance of this contract, on the part of the assured, has been rendered impossible by the act of the law, and as such occurrence was not a contingency, which can reasonably be supposed to have been within

\* Decision rendered Oct. 10th, 1872.

the contemplation of the contracting parties at the time they bargained, I think this failure in a strict compliance is not a legal breach of the agreement. The reasonable and true doctrine seems to be that express terms are necessary to create an obligation which will include a liability, in case of an unanticipated prevention by the act of God or of the law, of the fulfillment of a stipulation. In the absence of such an expressed intention there is always an implied understanding that the doing of the act agreed to be done shall not become absolutely impracticable from a remote and unanticipated event, occasioned by a natural or legal agency."

Lawrence vs. Twentiman, 1 Roll. Abridg., 450, Condition G. pl. 10; Williams vs. Lloyd, W. Jones, Rep., 179; Ld. Coke, 1 Inst., 206 a. b.; People vs. Manning & Condit, 8 Cowen, 297; Baker vs. Hodson, 3 Man. & Sel., 271; Hall vs. Wright, El. B. & El., 746, (96 E. C. L. R.); Brandon vs. Curling, 4 East, 417.

*Hillyard et al. vs. The Mutual Benefit Ins. Co.\**

Rep'd Jour'l p. 137.

N. J. S. C.

§ 19. LIFE.—*Impossibility of Performance—War and Life Insurance.*—The defendants, a corporation created by the laws of New Jersey, issued, before the late civil war, a policy, for the benefit of the plaintiffs, upon the life of their father. The policy contained a provision that in case the annual premiums were not paid, on or before the specified days, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine, and that all previous payments should be forfeited. The plaintiffs and the father were, and continued to be, citizens and residents of Virginia. The payment of the annual premiums was intermitted during the civil war, and the life insured terminated during the intermission of payment. *Held*, that "where the subject matter of the contract does not become unlawful, and it has been, in some degree, executed, so that the parties cannot be restored to their original condition, the contract, although for the time being some of its terms are not capable of performance, is not in a posture to be rescinded, either in whole or in part. When such a result is not absolutely inevitable, and when it would lead to injustice, it does not take place. Whenever the law interferes with

\* Decision rendered June 13th, 1872.



the contract, it should be held that such interference will disturb the intentions of the contracting parties to the least degree practicable."

*Odlin vs. Ins. Co.*, 2 Wash. C. C. R., 317.

*Held*, also, that "a continuance, during the progress of a war, of insurance on the life of an enemy is not inconsistent with the welfare of either of the belligerents."

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

—§ 18.

§ 20. LIFE.—*Illegal Stipulations—Forfeiture of Policies by War.*—The defendant was a life insurance company incorporated by the laws of New Jersey, and prior to the late civil war, insured, for the benefit of the plaintiffs, the life of their father. The father and the plaintiffs were, and continued to be, citizens and residents of Virginia. The policy provided that in case the annual premiums were not paid on or before the specified days the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine, and that all previous payments should be forfeited. The payment of the annual premiums was intermitted during the civil war, and the father died during the intermission of the payment. *Held*, that "a stipulation that the money should be payable, even though the life insured should be lost in a war which might arise between the state of the assured and the insurer, would be clearly illegal and void; and the consequence is, no such provision, which, if present, would vitiate the whole agreement, can be understood to be comprehended in the general expressions which are in common use in these policies. An exception is invariably implied embracing every case of a loss of life by any means, concerning which it would be criminal or incompatible with the law or against the public interest to stipulate or bargain." *Held*, also, that debts due from a citizen of this country to an enemy are not liable to forfeiture on the breaking out of hostilities, except by the action of Congress; much less can a vested right, such as arises out of the present policy, be forfeited by the operation of the war, for the benefit of one of the contracting parties.

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

—§ 18.

## EVIDENCE.

§ 21. FIRE.—*Explanation of Affidavit.*—After the loss, caused by building a fire in a stove after the removal of the pipe, the plaintiff made an affidavit, which had been prepared by the officers of the company, setting out the facts connected with the loss. This paper was introduced in evidence on the trial by the company, to prove the admission of the plaintiff that he had not done right in permitting the stove to stand after the removal of the pipe. *Held*, that plaintiff was properly allowed to explain the circumstances under which the affidavit was given, and to state that he did not understand the purpose defendant had in demanding it, and that he believed at the time that it was to be used for publication as an advertisement. “If the language of a witness, either written or oral, is introduced to establish an admission, he has the privilege of giving his understanding of its import—of stating its true meaning in the connection as used by him.”

1 Greenleaf's Ev., 462, note 1.

*Mickey vs. The Burlington Ins. Co.*

—§ 17.

## INSURABLE INTEREST.

§ 22. FIRE.—*Mortgagor and Mortgagee—Practice.*—The amount of the insurance was by the terms of the policy made payable, in case of loss, to a third party, who held a mortgage on the premises. *Held*, “that both the mortgagor and mortgagee have a separate insurable interest, has long been held and recognized by all courts, and the law upon that question is too well settled to be now doubted,” and that the contract being with the mortgagor, the legal title vested in him, but it was for the benefit of the mortgagee. Hence, the suit was properly brought in the name of the assured, for the use of the beneficiary. Policies of insurance are not assignable at common law, or by any provision of our statute, so as to give the assignee the right of action in his own name.

*New England F. and M. Ins. Co. vs. Wetmore*, 32 Ill., 221.

*Illinois Mutual Fire Ins. Co. vs. Stanton.*

—§ 18.

## · LIMITATION.

§ 23. FIRE.—*Of Suit—Waiver.*—The policy contained a provision that no suit should be sustained, unless brought within six months after the occurrence of the loss, and that in case an action should be brought after that time, “it shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.” The action was brought more than six months after the occurrence of the loss. *Held*, that the jury were correctly instructed “that if plaintiff delayed bringing suit until after the expiration of six months in consequence of inducements held out by defendant’s officers, causing him to believe that the loss would be paid or adjusted without suit, this would operate to remove the bar created by the condition of the policy requiring an action thereon to be brought within six months after the loss.”

*Grant vs. Lexington F. & M. Ins. Co.*, 5 Ind., 22.

*Mickey vs. The Burlington Ins. Co.*

—§ 17.

## MUTUAL COMPANY.

§ 24. FIRE.—*Membership in—Stock Insurance.*—The company was organized upon the mutual plan. By an amendment to the charter of the company it was provided that the original charter be so amended that “any party applying for insurance for one year or less time, may pay a definite sum of money for such insurance, in lieu of a premium note.” The policy sued on was issued under this provision. *Held*, that “a party insuring under this provision of the amended charter, does not become a member of the company, and stands in no different relation thereto than to any stock company,” and that “the law, under such circumstances, would impose upon him no higher or greater duties than if the insurance had been effected in a stock company.”

*Illinois Mutual Fire Ins. Co. vs. Stanton.*

—§ 18.

## NEGLIGENCE.

§ 25. FIRE.—*Evidence.*—The wife of the insured took down a stove-pipe which passed through a chamber, and placed a bed

over the hole in the floor, through which it had passed. A few days after she caused a fire to be built in the stove. The result was that the fire was communicated to the bed and the house was consumed. *Held*, that insurances against fire on land cover losses occasioned by the mere fault and negligence of the assured and his servants, unaffected by any fraud or design.

Columbian Ins. Co. vs. Lawrence, 10 Pet., 507; Huckins vs. People's Mut. Ins. Co., 11 Foster, 238; St. John vs. Am. Ins. Co., 1 Duer, 371; Hyndset al. vs. Schenectady Co. Mut. Ins. Co., 16 Barb., 119; Gates vs. Madison Co. Mut. Ins. Co., 1 Seld., 469; Catlin vs. Springfield Fire Ins. Co., 1 Sumner C. C., 434; Matthews vs. Howard Ins. Co., 13 Barb., 234; 1 Phillips on Ins., § 1,096, and authorities cited.

*Held*, also, that the testimony of the insured that it was the custom in his house, in the summer time, to take the stove out of the room, where it was used, and the testimony of his wife, that it was not intended or expected that a fire would be placed in the stove after the removal of the pipe, was properly admitted on the trial, as it was evidence showing that the fire resulted from negligence and not through design.

*Mickey vs. The Burlington Ins. Co.*

—§ 17.

#### POLICY.

§ 26. FIRE.—*Waiver of Condition in—Assignment of.*—The policy provided that if the property insured should become alienated, or the title in any manner changed, the company should not be liable for any loss or damage that should happen, unless the policy should have been duly assigned, by consent of the directors, to the actual owner or owners thereof, previous to the loss and damage, and that no policy should be deemed to have been duly assigned “unless the consent of the directors to such assignment or confirmation is certified on such policy by the secretary of said company.” *Held*, that this provision “was inserted for the benefit and protection of the company, and no reason is perceived why the company may not waive that condition, as well as any other restriction on the assured, inserted in the contract for their benefit. The cases are numerous where persons have been held to have waived provisions and conditions inserted in contracts for their special benefit. Where

such waiver distinctly appears, the reasonable rule of law is that the party will be estopped from insisting on that which is inconsistent with what he has said and done, that affects the rights of others. It is in such cases that the doctrine of estoppels *in pais* finds its just application." "The same doctrine has repeatedly been held by courts of the highest authority to apply to mutual insurance companies, as well as to stock companies."

Peck vs. New London Ins. Co., 22 Conn., 565; Sheldon vs. Conn. Life Ins. Co., 25 Conn., 207; Bouton vs. The American Mut. Life Ins. Co., 25 Conn., 543; Wing vs. Harvey, 27 Eng. Law & Eq. R., 140; Buckbee vs. U. S. Ins., Annuity & Trust Co., 18 Barb., 541; Ang. on Ins., §343.

*Illinois Mutual Fire Ins. Co. vs. Stanton.*

—§ 16

§ 27. LIFE.—*Avoidance of—Fraudulent Answers in Application—Practice.*—The policy, which was issued upon the application of the plaintiff, the son of the assured, provided that if the answers to the questions in the application were in any respect false or fraudulent, the policy should be void. In the application, the plaintiff stated that his father was then in good health, of sound body and mind, and that he usually enjoyed good health, and that he had not concealed, withheld or misrepresented any material circumstance in respect to the past or present state of his health or condition. Among the questions and answers, signed by the plaintiff and the assured, were the following: "Has the party ever had any of the following diseases?" Among those named were, asthma, disease of the heart, palpitation and spitting of blood. To this the answer was: "See surgeon's report." It was also answered that he had not and never had a habitual cough. The examining physician stated that the party had never suffered from disease of any kind, and that he had no cough and no palpitation of the heart. The referee in the Supreme Court found for the plaintiff, and the General Term granted a new trial on questions of fact. *Held*, that these questions of fact are open to review by this court.

Code, Section 278.

*Held*, also, that the questions asked "were all material questions, and their concealment was just as fatal to this contract as

their denial;" that the assured had spitting of blood and disease of the heart for months, before the application; that his statement that he had no family physician was "a palpable, fraudulent concealment of a material fact," and that it was the duty of the Supreme Court to set aside a verdict which is against the clear weight of the evidence. "The order appealed from is affirmed, and judgment absolute ordered for the defendant."

*Smith vs. The Aetna Life Ins. Co.\**

Rep'd Jour'l p. 116.

N. Y. C. A.

### PRACTICE.

§ 28. FIRE.—*New Trial*.—After the trial in the court below, at which evidence was adduced by both parties, the jury instructed by the court, a verdict found for the plaintiff, and judgment duly entered, all without any exception being taken by the company, the defendant, the defendant moved the court to set aside the verdict and grant a new trial. The court overruled the motion, and to this the defendant excepted, and in the bill of exceptions set out all the evidence in the case. The only point made in this court is that, according to the evidence thus set out, the plaintiff was not entitled to recover. *Held*, that "the granting or overruling of a motion for a new trial in the courts of the United States, rests wholly in the discretion of the court to which the motion is addressed. This is so well settled that it is unnecessary to remark further upon the subject."

*Henderson vs. Moore*, 5 Cr., 11; *Barr vs. Gratz's Heirs*, 4 Wheat., 220; *Doswell vs. De La Lauza*, 20 How., 29; *Schugart vs. Allen*, 1 Wall., 371.

*The Home Ins. Co. vs. Barton*.†

U. S. S. C.

§ 29. LIFE.—*Action in Name of Beneficiary*.—The insurance was for the benefit of the daughters, upon the life of their father. The person effecting their insurance was called, in the contract, their agent and trustee, and the policy provided that he should pay the annual premiums. After the death of the father, suit was brought in the name of the daughters and their husbands. *Held*, that this action was properly brought in the name

\* Decision rendered April 16th, 1872. To appear in 46 N. Y.

† Decision rendered May 6th, 1872.

of the plaintiffs. "The general rule is that the suit may be brought on these policies, when in the form of simple contracts, in the name of the party having the beneficial interest. It is true that the agent, who effected the insurance, is styled in it a trustee, but that does not make him such, as his powers and capacities appear to be those simply of an agent."

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

—§ 12.

#### PREMIUM.

§ 30. *LIFE.—Effect of War on Payment of.*—The defendant, a life insurance company, incorporated by the laws of New Jersey, issued, before the late civil war, a policy for the benefit of the plaintiffs, upon the life of their father. The policy provided that in case the annual premiums were not paid, on or before the days mentioned in the policy for the payment thereof, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine, and that all previous payments should be forfeited. The plaintiffs and their father were, and continued to be, citizens and residents of Virginia. The payment of the annual premiums was intermitted during the continuance of the civil war, and the father died during such intermission. *Held*, that the defendants, by the interdict of their own government, were disqualified, during the war, from receiving the premiums, and a tender of the money by the plaintiffs must of necessity have been rejected by the defendants. They "cannot be permitted to impute a result, occurring from their own incapacity, as a breach of agreement on the part of the plaintiffs."

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

—§ 12.

§ 31. *LIFE.—Effect of War on Payment of—Tender of.*—The defendants, a life insurance company, incorporated by the laws of New Jersey, issued, before the late civil war, a policy for the benefit of the plaintiffs, upon the life of their father. The policy provided that in case the annual premiums were not paid on or before the days mentioned in the policy for the payment thereof, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease

and determine, and that all previous payments should be forfeited. The plaintiffs and their father were, and continued to be, citizens and residents of Virginia. The payment of the annual premiums was intermitted during the continuance of the civil war, and the father died during such intermission. A tender of the premiums was made after the close of the war. *Held*, that "the payment of these several premiums on the contract days, was excused, from the fact that such payment was rendered impossible by the war."

The Manhattan Life Ins. Co. vs. Warwick, 20 Grat., 614; \* Robinson vs. International L. A. Co., 42 N. Y., 54; The New York Life Ins. Co. vs. Clop-ton, 7 Bush, 179.

*Held*, also, that "the tender of these premiums was, in legal effect, a compliance with the plaintiffs' stipulation in that respect."

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

—§ 12.

§ 32. LIFE.—*Effect of War on Payment of.*—The defendants, a corporation created by the laws of New Jersey, issued, before the late civil war, a policy for the benefit of the plaintiffs, upon the life of their father. The policy contained a provision that, in case the annual premiums were not paid on or before the specified days, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine, and that all previous payments should be forfeited. The plaintiffs and their father were, and continued to be, citizens and residents of Virginia. The payment of the annual premiums was intermitted during the civil war, and the life insured terminated during the intermission of payment. *Held*, that "a war, either foreign or domestic, puts an end, during its continuance, to all amicable intercourse between the citizens of the respective belligerent powers."

"All contracts made with an enemy during war are void, and all payments of debts or remission of funds under similar circumstances, are illegal and forbidden." *Held*, also, that "by force of this rule the payment of these premiums, at the stipulated times, became legally impossible. If they had been tendered, the de-

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\* 1 Ins. Law Jour'l, 115.



fendants could not, without doing an unlawful act, have received them. Both the payment and the receipt of the moneys would have been a breach of duty and of law."

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

—§ 12.

#### PREMIUM NOTES.

§ 33. FIRE.—*Assessment on—Evidence—Statute.*—The premium note specified that it was given for a policy, issued by the insurance company, and was to be paid in such portions, and at such times as the directors of the said company might, agreeably to the general incorporation laws of the State, and the by-laws of the company, require. An assessment was made and suit was brought upon the note. The plaintiff offered in evidence, and the court admitted, a copy of a resolution passed by the board of directors, by which an assessment of 25 per cent. was levied on all premium notes held by the company, to discharge the indebtedness of the company up to a certain date. The resolution was duly certified to by the president and secretary of the company, with the seal of the company affixed. The statute provided that the premium notes "shall be made payable in part or in whole, at any time when the directors shall deem the same requisite for the payment of losses and other expenses or purchases," and empowered the board of directors to make an assessment or assessments as often as they deem it necessary to meet the liabilities of the company. *Held*, that under the statute relating to evidence, the certified copy of the resolution was properly admitted. *Held*, also, that the defendant was not liable at the mere discretion of the directors. There must have been actual losses or expenses before the defendant was liable, "Assessments cannot be made on these premium notes, unless the necessity therefor properly and legally arises. The protection of the party conditionally bound, demands that the other party should show the necessity, not by a mere resolution or declaration, but by proof that payment was legally required."

*Thomas vs. Whallon*, 31 Barb., 172; *American Ins. Co. vs. Schmidt*, 19 Iowa, 502; *Bangs vs. Gray*, 2 Kern., 477; *Herkimer Co. Mut. Ins. Co. vs. Fuller*, 14 Barb., 373; *In re Bangs*, 15 Barb., 264; *Atlantic Ins. Co. vs. Fitzpatrick*, 2 Gray, 279; *Long Point Ins. Co. vs. Hough-*

ton, 6 Gray, 77; *Savage vs. Medbury*, 19 N. Y., 32; *Bangs vs. Duckinfield*, 18 N. Y., 592; *Stow vs. Wadley*, 8 Johns., 124; *Ferris vs. Purdy* 10 Johns., 359.

*Pacific Mut. Ins. Co. vs. Guse.\**

Rep'd Jour'l, p. 50.

Mo. S. C.

## WAR.

§ 34. LIFE.—*Effect of, on continuing Contracts—On Insurance Company.*—The defendant was an insurance company, incorporated by the State of New Jersey. This company issued, before the late civil war, a policy for the benefit of the plaintiffs, upon the life of their father. The policy contained a provision that in case the annual premiums were not paid on or before the specified days, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine, and that all previous payments should be forfeited. The plaintiffs and the father were, and continued to be, citizens and residents of Virginia. The payment of the annual premiums was intermitted during the civil war, and the life insured terminated during the intermission of payment. *Held*, that a continuing contract, which has been partially performed, and which will remain in force from its own intrinsic quality, without the doing of anything by any party to it, is not dissolved by the occurrence of the war. As the payment of the premiums was suspended, the continuance of the contract in question was not dependent on the doing of any act on the part of the company or the assured, and the contract was not annulled. *Held*, also, that if under the incorporation of the company the plaintiffs, as holders of a policy, became partners with the other corporators, the war did not dissolve such partnership; and such dissolution, even if it took place, would not affect the obligations of the policy.

*Hillyard et al. vs. The Mutual Benefit Ins. Co.*

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\* Decision rendered January Term, 1873. To appear in 49 Mo.

# REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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## COURT OF APPEALS OF NEW YORK.

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*Appeal from General Term of Court of Common Pleas of the City of  
New York.*

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SOPHIA V. D. REYNOLDS, *Respondent*,

vs.

THE COMMERCE FIRE INS. CO., OF N. Y., *App't.* }

[Continued from January Number, page 63.]

At the close of the plaintiff's case, the defendant's counsel moved for a dismissal of the complaint, on the ground that it appeared by the plaintiff's own evidence that at the time of the fire there was a change in the use and occupation of the premises insured, affecting and increasing the risk. The court denied the motion, and defendant's counsel excepted.

At the close of the case on both sides, the court directed the jury to find a verdict upon the following questions, viz: Did Mr. Lang, the agent or representative of the plaintiff, say that he thought that a change had occurred in the business carried on in the premises, and refer the defendant to the Merchants Insurance Company for information on that subject, at the time the renewal was asked for?

The jury brought in a verdict answering the question in the affirmative. Thereupon, the court ordered judgment, upon the verdict, in

favor of the plaintiff, for the sum of \$800.09, with costs, to be adjusted. To which order for judgment, the defendant's counsel duly excepted.

CHURCH, CH. J.

It is objected on the part of the appellant, that some of the buildings insured, and the two in which the fire originated, were used for a purpose not permitted by the terms of the policy, and that the policy was, therefore, void. Of the forty buildings insured, seven only were injured by the fire, two of which were used for distillery purposes. After a description of the premises, the policy contains, in writing, the following: "The above premises are privileged to be occupied as hide, fat-melting, slaughter and packing-houses, and stores and dwellings, and for other extra hazardous purposes." Annexed to the policy is a classification of hazards. In the second class are defined "hazardous No. 2," "extra hazardous No. 2," "extra hazardous No. 3," and "specially hazardous." The occupations specifically privileged, such as, "hide, fat-melting, slaughter and packing-houses," do not fall within any definition of "extra hazardous," but do come within that of specially hazardous, and distilleries belong to the same class.

In *Pindar vs. The Continental Ins. Co.*, 38 N. Y., 366, it was held that the meaning of the terms "hazardous" and "not hazardous" is to be determined by the definition of those terms contained in the conditions of the policy, and did not include "extra hazardous" or "specially hazardous" articles, and consequently that the keeping of turpentine, being an article defined as "extra hazardous," was a violation of the terms of the policy, and prevented a recovery. It was not decided, in that case, that these terms had any such technical or fixed meaning, that their signification might not be modified or varied in a given case, by a reasonable construction of stipulations inserted by the underwriters, at the time of issuing the policy. The same case came before this court recently, and the above decision was followed upon the express ground that the definition of these terms in the policy was controlling, which, of course, would not affect modifications by other stipulations. See *Opinion*, by *Rapallo, J.\**

It is an elementary rule, that where there is an inconsistency in the written portion of a policy, and, indeed, of any contract, the written is to be preferred to the printed, as the attention of the parties is

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\* 1 Ins. Law Jour'l, 827.

supposed to be more directly drawn to such parts as are written than to the printed, which are used in all cases. 2 Par. on Contracts, 516 ; 1 Arnould on Ins., 80.

The privileged uses specified are "specially hazardous," as defined in the classification of hazards, annexed to the policy. They are not enumerated, but are included in the general words of "all workshops, manufacturing establishments, trades and mills not above enumerated as hazardous or extra hazardous." The words in the policy, "or other extra hazardous purposes," must be taken to mean purposes of the same class as those before specified, and the term "extra hazardous" must yield to the specifications accordingly.

If the language had been, "and other like purposes," the right of the plaintiff to use the premises for any purpose enumerated as specially hazardous, would have been unquestioned. No other construction could have been given. The language used is certainly capable of the same construction, and such is the construction which persons receiving a policy would ordinarily put upon it. It is the same as though every occupation enumerated as specially hazardous had been specified, and then the general words, "and other extra hazardous purposes," used. In such a case, it is clear that the term "extra hazardous" would be construed with reference to the specifications preceding them, upon the principle that general words yield to particular recitals. 2 Par. on Contracts, 501, note u. I think this principle applies to this policy, and that the plaintiff had a right to use the premises for any specially hazardous purpose. Insurance companies are not restricted in the right to insert such terms and conditions in their policies as they see fit, and it is the duty of courts to construe them according to established legal principles. If persons receiving policies neglect to examine these conditions, they must take the consequences. But legal principles and public policy demand that equivocal language, especially if calculated to mislead the assured, shall be construed most strongly against those using the language, and issuing the policies.

It is a general rule that in cases of doubt, arising from the ambiguity of the language, the construction is to be favorable to the grantee. [*Coheco M'fg Co. vs. Whittier*,] 10 N. H., 305. Chancellor Kent says, the true principle is, "to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it," and this, of course, must be determined by the language used, and the surrounding circumstances. 2 Kent's Com., 557. The words, "other

extra hazardous purposes," would naturally be understood to include other like purposes, and we must presume that both parties so understood it.

The special finding of fact, by the jury, has an important bearing upon the question. That finding is, that the plaintiff's agent informed the company, at the time the renewal or new policy was applied for, that he thought that a change had occurred in the business carried on in the premises, and referred them to the Merchants Insurance Company for information on that subject. The Merchants Insurance Company had, it seems, recently insured the property, and caused a survey to be made, and if the defendant had made the inquiry, it would have led to a knowledge of the real facts. The statement of the agent, therefore, that he thought a change of business had taken place, and a reference to where the fact could be ascertained, was equally effective as a notice of the very change that had been made. In such a case, whatever is notice enough to excite attention, and put a party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it. 2 Kent's Com., 630, note 1; [Kennedy vs. Green,] 3 Myl. and Keen, 719.

It is unnecessary, however, to go beyond actual notice that a change had taken place, which the finding established. This knowledge is a circumstance proper to be considered in determining the intention of the defendant in the language employed, and it does not conflict with the rule, that parol evidence is inadmissible to vary the terms of written instruments. We may resort to surrounding circumstances, in all cases of doubtful construction, and patent ambiguity. If the words are clear and unambiguous, a contrary intention, derived from outside circumstances, is of no avail. A new contract cannot be made by showing that the intention was to make one different from that expressed. But to ascertain what the contract is, in case of ambiguous language, a resort may be had to the circumstances surrounding the author at the time. So, his knowledge or ignorance of certain facts, are competent to determine what he meant by the language used. As, in a devise to Mary B., for life, with remainder to her three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth. It was held that evidence was admissible to show that Mary B. formerly had a legitimate daughter, named Elizabeth, who died some years before the date of the will, and

that the testator did not know of her death, or of the birth of an illegitimate daughter. [*Doe vs. Beynon*,] 12 Ad. & Ell., 431. So, where a testator devised a farm in A, in possession of T. H., to T. R., and he had two farms in A., in possession of T. H., it was held that if one of the farms was subject to a trust, or if the testator supposed it was, and treated it as such, the other farm would pass by the devise, as he was presumed to have intended the farm devised for the personal use of T. R. [*Blundell vs. Gladstone*,] 12 Eng. Law and Eq., 52.

Mr. Parsons, in his work on Contracts, lays down the rule in such cases as follows: "If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony, and this intention will be taken as the meaning of the parties expressed in the instrument, if it be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used."

This intention, however, it should be observed, is to be ascertained, except in cases of latent ambiguity, by a development of the circumstances under which the instrument was made. Mere declarations are not admissible for the purpose. But the knowledge of facts by the party is competent; and notice that a change had been made, is as potent upon the question of "intention," as if the defendant knew that these buildings were actually used as distilleries. I think they are chargeable with that knowledge; but they certainly knew that a change had taken place.

We are to place ourselves, as nearly as may be, in the position of the author of the instrument, and consider the facts surrounding him, with his knowledge or ignorance of facts, and with his belief of the existence or non-existence of certain facts, and, in that position, we may often see clearly the meaning of language, which, without these aids, would be unintelligible or doubtful.

The old policy, which had expired, contained the same language as this one, permitting, specially, several specially hazardous uses; and with a knowledge that a change had taken place in the use of some of them, we must presume an intention, on the part of the defendant, to provide for them in this policy; and as those uses expressly permitted, belonged to the highest grade of hazards, and the language employed is capable of a construction permitting all other like uses, we are bound to presume that the defendant intended such a construction; otherwise it must have acted in bad faith, which is never presumed. We are to suppose, if the language will permit it, that the defendant intended to protect the property of the assured

according to the change which it knew had taken place. The distinction between this and the Pindar case is, that in that case the language was held to be unambiguous, and, although the policy was claimed to be different from that called for, yet, having been issued, delivered and accepted, and sued upon, the assured was bound by its terms, and that extrinsic evidence of circumstances, or otherwise, was incompetent to change it.

Such is the established law, but it does not apply to a case where the language is capable of different constructions. The defendant was defeated upon the issue of fact made in the court below, and that finding is conclusive upon this court, whether right or wrong, and the effect of it, upon what the defendant intended by the language used, is adverse to the construction put upon it by it.

This construction of the contract renders the testimony offered, that distilleries are more hazardous than the establishments specified, immaterial. The assured having the right to use the premises for any specially hazardous purpose, it was not competent to prove any distinction of hazards in these premises.

In the Pindar case, *supra*, it would have been incompetent to show that turpentine was not more hazardous than some of the articles enumerated as hazardous, simply because, by the terms of the policy, that article was fixed at a higher grade of hazard, by being defined as extra hazardous.

The defendant is precluded from claiming any breach of warranty, or fraudulent representation, in the application upon which this or the first policy was issued. The first policy was issued upon the survey of an agent of the Standard Insurance Company, and not upon any representation of the plaintiff or her agent; and the survey was, in all respects, correct. 18 N. Y., 552; [Rowley vs. The Empire Ins. Co.,] 3 Keyes, 557.

This finding takes away all ground of complaint of fraud or unfairness, on the part of the assured; and, as the rigid construction claimed by the defendant cannot be sustained, the judgment must be affirmed, with costs.

Allen, Peckham, and Rapallo, JJ., for affirmance, on the ground first stated in opinion. Grover and Folger not voting.

Judgment affirmed.



## SUPREME COURT OF INDIANA.

MAY TERM, 1872.

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*Appeal from Vanderburgh Circuit Court.*

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THE MUTUAL BENEFIT LIFE INS. CO., *Appellant,*

vs.

KATY A. MILLER, ADM'X, OF HERMAN A. MILLER,  
DEC'D, *Appellee.\**

The policy provided that if the declaration made by or for the assured should be found in any respect untrue, the policy should be null and void. It was stipulated in the declaration, signed by the assured at the time of application for insurance, that the answers of himself, his physician, and his friend, should be the basis of the contract.

In the particulars given of himself, in answer to questions asked, the assured stated that he had not since childhood had spitting of blood or consumption; that he had not had any sickness within the last ten years except scarlet fever, and that he had not then any disease or disorder.

For the errors occurring on the trial we must look to the reasons assigned in the motion for a new trial and not to the assignment of errors except so far as it alleges the improper overruling of that motion.

The evidence showed that prior to the issuing of the policy the deceased had had spitting of blood and that he then had consumption; that he knew he had had spitting of blood and had sufficient reason to believe that he then had consumption.

The policy, the declaration, and the particulars stated in the application, must be regarded as one instrument.

A covenant or agreement to become a warranty need not appear on the face of the policy, but may be on a paper referred to in and made a part of the policy.

If the assured had had spitting of blood, prior to the time when he effected the insurance, he was bound to state the fact in the particulars of himself given in answer to the questions propounded to him.

The fact that he was examined by a surgeon, employed for that purpose by the company, was no excuse for his not having done so.

In this case the answers must be held to be warranties on the part of the applicant, that the facts were as stated by him.

The application when forming part of the policy amounts to a condition or warranty, which must be strictly true or complied with, and upon the truth of

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\* Decision rendered May 31st, 1872.

which, whether a misstatement be unintentional or not, the whole instrument depends.

A warranty may be of the existence or non-existence of some fact when it is in the nature of a precedent condition, or it may be promissory, as where the insured undertakes to perform or abstain from some act in the future when it is in the nature of a condition subsequent.

A representation differs from a warranty, for while the latter must be true, the former need only be substantially true—true so far as the representation was material to the risk.

A fact is to be deemed material if a knowledge of it would have induced the insurer to have refused the risk or to have charged a higher rate of premium for taking it.

Whether the case is to be regarded as one depending on the warranty or on the misrepresentations, alleged in the second paragraph of the answer, it was wrongly decided.

The counsel for plaintiff on the trial openly requested the judge to give his instructions to the jury in writing, and afterwards, when it was too late for the defendant to make the demand on her own behalf, withdrew his request. This was no cause for reversal of the judgment for the plaintiff.

BLYTHE HYNES *for Appellant.*

C. DENBY AND D. B. KUMLER *for Appellee.*

DOWNNEY, J.

This was an action by the appellee as administratrix of the estate of Herman A. Miller, deceased, against the appellant on a policy of insurance upon the life of the deceased. It was provided in the policy that if the declaration made by or for the assured of even date with the policy, and upon the faith of which the agreement was made, should be found in any respect untrue, then in such case the policy should be null and void. It was stipulated in the declaration made and required by the deceased at the time of his application for insurance, that the answers of himself, his physician, and his friend, should be the basis of the contract. In the particulars given of himself, the following questions and answers occurred :

10. "Has the party had since childhood disease of the heart, rupture, fits, dropsy, liver complaint, bilious colic, rheumatism, gout, habitual cough, bronchitis, asthma, spitting of blood, consumption, paralysis, apoplexy, insanity, fistula, ulcers, or disease of the kidneys or bladder, and which?" "No."

11. "Has the party had any sickness within the last ten years ; if so, what?" "Yes, scarlet fever eight years ago."

12. "Has the party now any disease or disorder ; if so, what?" "No."

The first paragraph of the answer alleges that the answer to the tenth question was false in this, that before the time at which said

answer was made, the said Herman A. Miller had had spitting of blood ; and had had and then had consumption ; and that the answer to question eleven was false in this, that prior to the time at which said answer was made, said Miller had had sickness other than scarlet fever eight years before ; to wit, bleeding of the lungs ; and that the answer of said Miller to the question numbered twelve was false and untrue in this, that at the time when said answer was made he said Miller had consumption of the lungs.

The second paragraph of the answer alleges that the execution and delivery of the said policy of insurance was obtained by the fraud and misrepresentation of said Miller in this, that he pretended and represented to the defendant at the time when he applied to the defendant to make and deliver to him the said policy of insurance, that he never had, since childhood, had spitting of blood, whereas in truth and in fact he had had spitting of blood within one year prior to said application ; and that he had had no sickness within the past ten years other than scarlet fever, whereas in truth and in fact he had had within the past one year bronchitis and bleeding of the lungs ; and that he then had no disease, whereas in truth he then had the disease known as consumption ; and that he had not had any medical attendant for the past seven years, when he had been attended by at least two physicians within the past seven years, all of which representations the said Miller well knew to be false.

Issue was formed by a general denial of the paragraphs of the answer. There was a trial by a jury, and general verdict for the plaintiff and also certain special findings.

The defendant moved the court for a new trial because :

1. The verdict was contrary to law.
2. It was contrary to the evidence.
3. It was not sustained by sufficient evidence.
4. Because error of law occurred at the trial of the cause, which was excepted to at the time by the defendant, in this, that the court, in giving instructions to the jury, gave instructions contrary to law.
5. Because of error of law occurring at the trial of the said cause, which was excepted to at the time by defendant, in this, that the court refused to give to the jury instructions asked for by the defendant, which said instructions were according to law.
6. Because the defendant and her [its] counsel were surprised at the withdrawal by the counsel for the plaintiff of his demand for written instructions, after he had notified the court and defendant's counsel that he made such a demand, such withdrawal having been

made without notice to the defendant or her [its] counsel and a knowledge of which did not come to defendant or her [its] counsel until too late to make such a demand on their own behalf.

7. Misconduct of the counsel for plaintiff in withdrawing his demand for written instructions after public notice of such demand, without notifying the defendant or her [its] counsel of such withdrawal. This motion was overruled by the court, and final judgment rendered, on the verdict of the jury, for the plaintiff.

The errors assigned are : 1. That the court erred in giving to the jury the instructions set out in the record.

2. The court erred in refusing at the request of the defendant to give the instructions asked for by appellant and which are set out in the record and numbered 1, 2, 3, 4, 5, 6, 7, and 8.

3. The court erred in overruling the motion of appellant to set aside the verdict of the jury and grant her [it] a new trial herein.

4. The court erred in rendering the judgment against appellant which is set out in the record. For the errors occurring during the trial we must look to the reasons assigned in the motion for a new trial and not to the assignment of errors, except so far as it alleges the improper overruling of that motion. The first and second assignments of error must therefore be disregarded by us. The fourth alleged error has nothing on which to rest. If the motion for a new trial was properly overruled the judgment followed as of course.

We shall then proceed to examine the reasons which are assigned for a new trial. Nothing is urged under the first reason for a new trial, that is, that the verdict was contrary to law. The second and third reasons are that the evidence was not sufficient to justify the finding of the jury.

The policy was made on the 3rd day of September, 1869. It became material to know among other things whether the deceased before that time had had or then had spitting of blood, or hemorrhage from the lungs, or not, or whether he then had consumption or not, and whether he had any disease.

John Rasch testified that the deceased was employed in his store on the 1st day of July, 1869, and remained there for sixteen or seventeen days, when he left on account of bad health ; that during that time he had bleeding of the lungs, several times very badly ; that he often spit up more than a tumbler full of blood. That at one time while he was there they thought he was going to die, and he went after Dr. Ehrman and brought him to the store to see Miller. That Miller told him, after he left his employment, that he was going

to get his life insured in order to get the money on the policy. That he had been to see Dr. Sheller, and that the doctor told him that the bleeding came from his lungs. Dr. H. M. Harney testified that the deceased came to his office in the early part of July, 1869, to consult him ; that the deceased told him that he had had hemorrhage ; that he examined him and found that he had tubercles upon one of his lungs, he did not remember which. He told the deceased that he had incipient consumption, and that he must change his employment and live more in the open air. That the deceased came to see him a second time during the same month, and told him that he had had another hemorrhage. That he told the deceased that hemorrhage was rather a favorable symptom than otherwise, because the bleeding carried away with it the foreign matter that was in his lungs. Thinks he told him that there was nothing serious the matter with him, though he told him at the time that he had incipient consumption. He knew this to be so from a careful examination of his lungs, and from what the deceased told him of his hemorrhages.

John Meyer testified that when the deceased came to Rasch's store he was not sick, that he knew of, but after he had been there a little while he commenced spitting blood. Saw him spitting blood at the store four or five times ; saw him spitting blood shortly after he was insured. The deceased staid at Rasch's store after he was insured ; sometimes worked at the books, and sometimes sold shoes.

Dr. Ehrman testified that Rasch came for him to go to see Miller. He went, and found Miller suffering from hemorrhage of the lungs, and saw him spitting blood. It came from the lungs, and in considerable quantities. Does not remember the time. It was at Rasch's store ; thinks it was the last spring.

Dr. Sheller testified that he was the attending physician of Miller from August 6th, 1869, to the 18th of November, following. The first time he was called to see him was at the house of Christian Georges, on the 6th of August, 1869. He had a hemorrhage of the lungs ; saw him spit up the blood, and knew it came from the lungs. He made a close examination of him at that time. He then had consumption, and he attended him for it up to the 18th of November, 1869. When he first saw him, he told him he was in a very dangerous condition. The defendant also gave in evidence, the declaration and the particulars of himself, signed by the deceased, containing the questions 10, 11, and 12, and the answers thereto, referred to in the pleadings, and also a statement by the deceased, that he had not had any medical attendance for the last seven years previous thereto. The

deceased died April 2nd, 1870, of disease of the lungs. There was other evidence for the defendant, and also evidence for the plaintiff, but it is not necessary to set it out, as it did not materially contradict that which we have stated. We think, from the evidence, that the jury should have found that prior to the issuing of the policy the deceased had had spitting of blood, and that he then had consumption; that he knew he had had spitting of blood, and had sufficient reason to believe that he then had consumption. The singular charge given by the court, to which an exception was taken, was as follows:

"The jury must treat this case just as if it was between two individuals, the corporation being entitled to precisely the same rights as though it were a natural person. In the consideration of the questions put to Miller by the company, the jury are to interpret the language by the usual and ordinary meaning attached to the words. These questions and answers are contained in an instrument which I hold in my hand. Now in his declaration the party says he is twenty-two years of age. Will anybody pretend that if he had made a mistake of one day, that it would make the policy void? They ask him if he had ever resided abroad, and if so, whether he was affected with any of the diseases peculiar to the climate. No ordinary man would know what diseases were peculiar to any given climate. In question number ten they ask him if he ever had since childhood a long list of complaints with hard names. In the first place, how are you going to tell when childhood ended. One of the diseases mentioned is rheumatism. Nobody knows, except a physician or surgeon, what that is, and no two doctors agree about it. They tell me I have rheumatism when I know I have not. There is not one man in a thousand in this country that ever saw a case of gout. As to bronchitis, there is not one of you that knew what that disease is until I made the doctors explain it; perhaps some of you know what asthma is. Consumption is a term that we all understand to mean a disease of the lungs. Here is mentioned a disease called fistula. Most people would take that to mean such a disease as horses have, which almost always affects them about the shoulders, but I suppose they mean here what is called *fistula in ano*. Question eleven is, has the party had any sickness within the past ten years? There is no man that has not been sick some time in his life. I am sick now. The party can only be required to answer as to sickness that was of such a character as to increase the risk upon his life beyond what it would be upon the life of a man in ordinary

good health. If he had had a slight sickness at some time during the last ten years, a negative answer would not be so untrue and fraudulent as to avoid the policy."

"Question seventeen, in which Miller is asked for the name of his usual medical attendant, must be taken to mean a physician who has attended him in frequent sickness, and cannot be taken to mean one who has attended him only once or twice; and if he had two or three physicians to prescribe for him in occasional sickness, he cannot be said to have a usual medical attendant."

"The certificate of Miller that he had had no medical attendance within the past seven years must be construed in the same way. It cannot be held to mean that he had not had such attendance as Harney or Ehrman, one of whom saw him twice and the other only once. If Dr. Sheller attended him from the 6th day of August, 1869, constantly to the 3rd day of September, 1869, frequently, not every day, but often, it would make the certificate a fraud upon the company."

"In order to find that Miller was guilty of fraud upon the company in answering that had no disease or disorder on the 3rd day of September, 1869, they must find that he had such a disease or disorder as would materially increase the risk upon his life, and that he knew or had good reason for believing that this was the case. A man may have incipient tubercular consumption and not be aware of it; especially if the examining surgeon of the company has examined him and pronounced him sound. If the jury believe that on the third day of September, 1869, Miller had consumption, and knew he had it, or had reason to suspect that he had it, they will have to find for the defendant."

"Spitting of blood is not necessarily a disease which would materially affect the risk. It may occur from a cold or a blow upon the face, or chest, or from inflammation of the fauces or posterior cavity of the mouth, or inflamed gums, and perhaps sundry other causes, none of which would be deemed material by the insurance company."

"In order to find that Miller was guilty of fraud, the jury must find that he knew, or was advised, or had good reason to suspect that he was in such a physical condition as to render the risk greater than in ordinary cases of men in apparent good health."

"The examining physician, Dr. Walker, must be deemed an agent of the company, and that he is skilled in his profession, and, in the absence of proof to the contrary, that he discharged his duty to the company, and was likely to detect consumption or slight symptoms or

it, if it had so far progressed as to make the applicant conscious of the fact that he was diseased."

The charges asked by the defendant and refused are as follows :

"1. If the jury believe from the evidence that the defendant, before the execution and delivery of the policy sued on, propounded the several questions contained in the application of Herman A. Miller, a copy of which is set out in the answer to the said Herman A. Miller, and that there is any untrue or fraudulent allegation contained in the same made to them by the said Miller, as set up in the answer, they must find for the defendant."

2. "The declaration and answers by the said Herman A. Miller, are to be taken as warranties that the statements and answers to questions are true, and any misstatement or untrue answer which is stated in the answer of defendant will render the policy void, and you must find for the defendant, and this will be so whether you find that the misstatement or untrue answers were made fraudulently or otherwise."

3. "The contract between the insurance company and the insured is like a contract between two individuals. If one makes false statements with reference to facts material to the settlement of the terms upon which the contract shall be made, and which are exclusively within his own knowledge, and thereby induces the other to agree to terms which he might not otherwise have assented to, the party deceived cannot be held liable upon the contract."

4. "If the jury believe from the testimony that in July, 1869, Herman A. Miller had spitting of blood, they must find for the defendant."

5. "If the jury believe that Herman A. Miller falsely represented to the defendant that he had had no medical attendance for the seven years next preceding the 3rd day of September, 1869, they must find for the defendant."

6. "It is not necessary for the defendant, in order to entitle her [it] to a verdict in her [its] favor, to show that Herman A. Miller knew at the time of making his answers that they were untrue, if in fact they were untrue."

6. "If the jury find that on the 3rd day of September, 1869, Herman A. Miller had consumption, they must find a verdict for the defendant, and it makes no difference whether he knew it or not. He may have been entirely ignorant of the fact, or may have believed that the symptoms he had did not indicate consumption. Yet if in



fact he had consumption at that time, the jury must find for the defendant."

8. "If Herman A. Miller, prior to the 3rd day of September, 1869, and since his childhood, had had spitting of blood, no matter from what cause, it was his duty to have stated the fact in answer to question No. 10, of his application, and if he failed to do so, it was a fraud upon the company and renders the policy void, and the jury must find for the defendant, if in addition to this they find that the said Miller made the answers to the questions as avowed in the defendant's answer."

We think that the policy, the declaration, and the particulars of the applicant, must be regarded as one instrument. The policy on its face refers to the declaration and it refers to the particulars. A covenant or agreement to become a warranty need not appear on the face of the policy, but may be on a paper referred to in, and made a part of the policy. *Cox vs. The Aetna Ins. Co.*, 29 Ind., 586, and authority cited: *Angell on Fire and Life Insurance*, Sec. 141. *Bleis on Life Ins.*, Sec. 57. If the applicant had had spitting of blood prior to the time when he effected insurance on his life, we think he was bound to state the fact in the particulars of himself given by him in answer to the questions propounded to him, and that the fact that he was examined by a surgeon employed for the purpose by the company, was no excuse for not having done so.

Such questions are designed to induce a full and fair statement of the condition of the party seeking insurance, and in this case the answers must be held to be warranties, on the part of the applicant, that the facts were as stated by him. Whether the hemorrhage proceeded from one cause or another, it was material and necessary that the statement in answer to the question relating to it should have been true.

*Geach vs. Ingall*, 14 M. & W., 95, was an action upon a policy of Life Insurance, and was very similar in its facts to the case under consideration. The defendant pleaded several special pleas, among them one in which he alleged that the declaration and statement of the assured was untrue in this: that at the time of making the same, the said assured had had spitting of blood. Lord Denman, before whom the case was tried, instructed the jury that it was for them to say whether, at the time of making the statement, the assured had had such spitting of blood as would have a tendency to shorten life. Upon appeal, and hearing before Pollock, C. B., and Barons Alderson

and Rolfe, a new trial was ordered for misdirection of the judge. Pollock, C. B., said : " By the expression ' spitting of blood ' is no doubt meant the disorder so called, whether proceeding from the lungs, the stomach, or any other part of the body ; still, however, one single act of spitting blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought therefore to be stated." Rolfe, B. said : " I have no doubt that, if a man had spit blood from his lungs, no matter in how small quantity, or even spit blood from an ulcerated sore throat, he would be bound to state it. The fact should be made known to the officers, in order that their medical adviser might make inquiry into its cause."

In *Vose vs. Euge Life Ins. Co.*, 6 Cushing, 42, one of the questions propounded to the insured, when he applied for insurance, was, " Has the party or any of his family been afflicted with pulmonary complaints, consumption, or spitting of blood?" To which he answered in the negative, and it is said, " The usual mode of proceeding to effect an insurance upon a life, is for the party wishing to insure to procure at the office of the insurers a printed form of proposal, which is to be filled up by him. This form, in general, contains a large number of interrogatories, the answers to which are to be written upon the blanks left for the purpose." This was the course of procedure in the present case, and several of the interrogatories and answers thereto are given in the statement. This proposal or declaration, when forming part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends.

The party effecting an insurance cannot be too cautious, therefore, in ascertaining the real state of the facts alleged in his declaration. In that case, because the party had answered the above interrogatory untruly, judgment was given for the company.

A warranty may be of the existence or non-existence of some fact, when it is in the nature of a precedent condition ; or it may be promissory, as where the insured undertakes to perform or abstain from some act in the future, when it is in the nature of a condition subsequent.

A representation differs from a warranty, for while the latter must be true, the former need only be substantially true—true so far as the representation was material to the risk. A fact is to be deemed material if a knowledge of it would have induced the insurer to have

refused the risk or to have charged a higher rate of premium for taking it.

The charge given by the court in this case need not be particularly examined. The court seems to have lost sight entirely of the distinction between a warranty and a mere representation. Had the case been tried on the issue formed on the second paragraph of the answer alone, the doctrine with reference to the effect of misrepresentation might have been applicable. But the charge given to the jury by the court was wholly inapplicable to the issue formed by the first paragraph of the answer setting up the warranty.

Whether the case is to be regarded as one depending on the warranty, or on the misrepresentations alleged in the second paragraph of the answer, we are clear that it was wrongly decided.

The instructions asked by the defendant and refused by the Court, being in accordance with the law as above stated, should have been given by the court, and the charge given should have been withheld, or so far as it was law, and applied to the question of misrepresentation, should have been confined to the issue formed by the denial of the second paragraph of the answer.

The remaining question is new. The law requires the judge, when requested by either party, to put his instructions to the jury in writing. Here the counsel for the plaintiff openly requested the court to put the charge in writing, and afterwards, when it was too late, as is contended, for the defendant to make such a request, the demand of the plaintiff for written instructions was withdrawn. It is insisted that this is cause for reversal of the judgment. We do not think so. It does not appear that any oral instructions were given by the court, or that the defendant was in any way injured by the course pursued.

The court might without doubt have taken the necessary time, if the request had been made, to prepare instructions in writing, but no such request was made.

The defendant had the same right to ask for and insist upon written instructions, that the plaintiff had, and if it wished to make sure of such charges should have preferred its own request and not depended on its adversary.

The judgment is reversed with costs, and the cause remanded with instructions to grant a new trial.

## COMMISSION OF APPEALS OF NEW YORK,

SEPTEMBER TERM, 1872.

*Appeal from General Term, Supreme Court, First District.*HORACE J. FAIRCHILD, *et al.*, Appellants,

vs.

THE LIVERPOOL AND LONDON FIRE AND LIFE  
INS. CO., *Resp't.*\*

The defendant issued to plaintiffs a policy upon merchandise in any or all of certain warehouses, and while in transition in or on any of the streets, yards, or wharves of New York, Brooklyn, or Jersey City.

A condition indorsed on the policy provided that in case the property aforesaid shall, at the breaking out of any fire, be collectively of greater value than the sum insured, then this company shall pay such a proportion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid. The same condition also provided that if the goods in any specified building or place within the limits of this insurance shall, at the time of any fire, be covered by any other insurance, this policy shall not extend to cover the same, excepting only any excess of value beyond the amount of such insurance or insurances, which excess is declared to be under the protection of this policy, and subject to average as aforesaid.

A fire occurred, destroying merchandise in one of the warehouses mentioned in the policy, upon which the amount of specific insurance was less than its total value, but more than the amount of the loss.

*Held*, that where the language of the policy is ambiguous, the surrounding circumstances, the situation of the parties and the object intended to be accomplished, may all be considered.

*Held*, also, that the effect of the condition in the policy was, that if at the time of any fire there should be any specific insurance upon the merchandise, the policy should only protect that portion which was in excess of the specific insurance, and that in this case, as the specific insurance exceeded the value of the goods destroyed, the loss did not reach the interest insured by the floating policy, and the defendant was not liable for any portion of the loss.

Appeal from a judgment of the General Term of the Supreme Court in the First District, affirming a judgment at the Circuit, dismissing the complaint.

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\* Decision rendered September Term, 1872.

The action was on a policy of insurance against loss by fire, issued by the defendant, an insurance company, doing business in the city of New York, dated November 23, 1863, by which the plaintiffs, who compose the mercantile firm of Fairchild & Fanshawe, in said city, were insured in the sum of \$20,000, on "merchandise, hazardous, not hazardous, and extra hazardous, then owned or held by them in trust or on commission, or on joint account with others, or sold but not delivered," against loss or damage by fire for one year, upon merchandise "in all or any of the brick or stone warehouses, and while in transition in or on any of the streets, yards, or wharves of the cities of New York, Brooklyn and Jersey City."

In the body of the policy, following the description of the property, are the words, "subject to average clause annexed." The policy then contained an agreement by the insurance company, as follows: "That the funds and property of the said company shall (subject to the conditions and stipulations indorsed hereon, which constitute the basis of this insurance,) be subject and liable to pay, reinstate or make good to the said assured, their heirs, executors or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned and hereby insured, not exceeding the sum or sums hereinbefore severally specified and stated against such property.

The only "conditions and stipulations" indorsed on the policy bearing on any question in this case were the following:

"XIII. That in all cases of insurance this company shall be liable for such ratable proportion only of the loss or damage happening to the subject insured, as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies, or the insolvency of any or all the other insurance companies."

And the following "Conditions of average:":

"It is hereby declared and agreed that in case the property aforesaid in all the buildings, places or limits, included in this insurance, shall, at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then this company shall pay and make good to the insured such a proportion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid, at the time when such fire or fires shall first happen. But it is at the same time declared and agreed, that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this

insurance, shall at the time of any fire be insured in this or any other office, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy, and subject to average as aforesaid."

During the life of the policy, on January 16, 1864, a fire occurred which destroyed merchandise of the plaintiffs, in a warehouse, No. 146 Duane street, in the city of New York, of the value of \$274,192.46.

At the time of the fire the plaintiffs had goods in the following stores, insured as follows :

No. 5 West street, \$134,600—Specific insurance, 144,500.

No. 8 Washington street, \$57,600—Specific insurance, \$65,000.

Nos. 114 and 116 Washington street, \$61,040—Specific insurance, \$63,000.

Nos. 102 and 104 Greenwich street, \$89,845—Specific insurance, \$95,000.

In Cunard's Wharf, Jersey City, \$7,777—no specific insurance.

In public store, Broadway, \$7,572—Specific insurance, \$2,000.

In 146 Duane street, \$386,026—Specific insurance, \$324,000.

After the fire the plaintiffs presented proofs of loss, but the defendant refused to recognize any liability as insurer in respect to the "excess of value" of the goods in 146 Duane street, on the ground that their policy was to be construed so as to exclude any liability under it, unless the loss sustained was in excess of the entire amount of the specific insurances on the goods affected by the fire.

The only question upon the trial was upon the law as to the construction of the policy. At the close of the evidence the defendant moved to dismiss the complaint, upon the ground that the amount of the loss on the merchandise in the store in question being less than the amount of the specific insurance thereon, the defendant was not liable for any portion thereof.

The plaintiffs contended in opposition, that the defendant having expressly insured the goods in said store to the extent of the "excess in value" over the amount of the specific insurance, which said excess was declared to be under the protection of the policy in question, were bound to make good to the insured, in accordance with their "conditions of average," the loss which had befallen such "excess of value," according to its due proportion.

The court thereupon granted the said motion, and directed the

complaint to be dismissed, and the plaintiffs' counsel excepted to the decision.

A motion having been made for a new trial and denied, the plaintiff appealed from the order and judgment, to the general term, and then to this court.

WILLIAM ALLEN BUTLER, *for Appellants*

S. E. LYON, *for Respondent.*

EARLE, COM.

The sole question to be determined in this case is whether the policy sued on covered any interest affected by the fire. If it did, then the defendants are bound to contribute to the loss ; if it did not, then they are exempt from liability. This question depends upon the construction of the policy, and in its solution, as we cannot have the aid and guidance of any prior adjudication, (as none has been found bearing upon the question,) we must seek for the intention of the parties, making use of the rules and canons of construction and interpretation which have been recognized by the courts as useful and proper helps in such cases. If the language used by parties be free from ambiguity, their intention must be sought in the language ; but if it be ambiguous, then the surrounding circumstances, the situation of the parties, and the objects intended to be accomplished, may all be considered, and the language read in the light which they reflect.

This is what is called a floating policy, intended to cover property or value which cannot well be covered by specific insurances, from the circumstance that it is changing in quantity or location. The ordinary purpose of such a policy is to supplement specific insurances, and to cover values not covered by them. Here the plaintiffs' property would sometimes be in one warehouse and sometimes in another, and sometimes on wharves or in transit over the streets, and sometimes above the specific insurances and sometimes under them in value. Hence the necessity for this floating policy, to attach to the property wherever it might be, and in all cases where it happened to exceed the specific insurance.

Insurance is matter of contract, and the parties to it can specify what property, value or interest it shall in any case cover. It may cover the whole property or any specified interest or value in it ; it may indemnify against loss generally, or loss above a certain sum or percentage.

This insurance was upon merchandise described and located in the

policy, but subject to the average clause, which provided that if the merchandise should at the time of any fire be insured by any specific insurance, then "this policy shall not extend to cover the same, excepting only so far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy."

It was thus provided that if at the time of any fire there should be any specific insurance upon the merchandise, this policy should not cover the same, but should then attach to and protect only that portion of the value of the same which was in excess of the specific insurance. In that event it was such excess or value alone which was intended to be insured, and in case of fire, the whole loss was intended to be thrown upon the specific insurances unless it exceeded the amount of them, and then the excess alluded to fell upon the floating policy.

Here the specific insurance far exceeded in amount the value of the goods destroyed, and hence the loss did not reach the interest insured by the floating policy ; and therefore I can perceive no rule of law or principle of justice which requires the insurers by this policy to contribute any portion of the loss.

The judgment should be affirmed with costs.

"Earle, C., reads for affirmance. All concur. Judgment affirmed with costs."

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## COURT OF APPEALS OF NEW YORK.

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*Appeal from General Term of Supreme Court.*

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CHARLES F. SMITH, *Appellant*,

vs.

THE ÆTNA LIFE INS. CO., *Respondent*.\*

The policy, which was issued on the application of the plaintiff, the son of the assured, provided that if the answers to the questions in the application were in any respect false or fraudulent, the policy should be void.

Among the questions were the following : " Has the party ever had any of the fol-

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\* Decision rendered April 16th, 1872.



lowing diseases?" Among those named were, asthma, disease of the heart, palpitation, and spitting of blood. The answer was : " See surgeon's report." It was also answered that he had no family physician.

The referee, in the Supreme Court, found for the plaintiff, and the General Term granted a new trial, on questions of fact.

These questions are open to review by this court.

The above were all material questions, and their concealment was just as fatal to this contract as their denial.

The assured had spitting of blood and disease of the heart, for months before the application, and his statement, that he had no family physician, was a palpable fraudulent concealment of a material fact.

It was the duty of the Supreme Court to set aside a verdict, which is against the clear weight of evidence.

The order appealed from is affirmed, and judgment absolute ordered for the defendant.

Appeal from the order of the General Term of the Supreme Court in the Fourth Department, setting aside the judgment entered upon the report of the referee, ordering a new trial herein.

L. TREMAIN, *for Appellant.*

R. TRACY, *Opposed.*

PECKHAM, J.

The action was upon a policy of insurance, applied for by the plaintiff, on the 19th day of January, 1867, upon the life of his father, J. C. Smith. Policy issued February 11th, 1867, and the insured died May 11th, same year.

In the application for insurance, plaintiff stated that his father "is now in good health, of sound body and mind, and usually enjoys good health, \* \* \* and that I have not concealed, withheld or misrepresented any material circumstance, in relation to the past or present state of his health or condition, which may render an assurance of his life more than usually hazardous, or with which the directors of said company ought to be made acquainted." The questions and answers were signed by the applicant, with his name and with that of the insured, and it was agreed that if the answers were in any respect false or fraudulent, the policy would be void. Among the questions were these : "Has the party ever had any of the following diseases?" naming some twenty in number, among which are, asthma, disease of the heart, palpitation and spitting of blood. The answer is, "See surgeon's report."

Another question : "Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted." Answer : "Had no physician."

Another : "Has the party, or has he had, an habitual cough ?"  
Answer : "No."

The examining physician, in answer to the question, whether the party has "ever suffered from disease of any kind," said, "No." Also, in answer whether cough, occasional or habitual, or expectoration, or occasional or uniform difficulty in breathing, or palpitation, the physician said : "No cough ; walking fast up stairs or up hill, produces difficulty in breathing ; no palpitation."

The referee found generally for the plaintiff, and that deceased died of pleura pneumonia, and he refused to find that deceased was afflicted with spitting of blood at time of, or prior to, the application.

The General Term granted a new trial, on questions of fact, and hence they are open to review in this court. Code, § 278.

Then, was the deceased in "good health" when this application was made, or did he then "usually enjoy good health?" Had he had spitting of blood, asthma, or disease of the heart?

These were all material questions, and their concealment was just as fatal to this contract as their denial. I think it is established, beyond doubt or contradiction, that he had spitting of blood for months prior to this application. I am satisfied he had disease of the heart for many months prior to his death ; but a question was made among the doctors upon that point, and whether he died of pneumonia or of disease of the heart, and I do not intend to examine that point now, if at all.

As to spitting blood, his physician, Dr. Hoxie, testified to his raising blood from two to two and a half years prior to his death. The doctor called it a passive hemorrhage of the lungs. He spoke to the doctor about it. "He would cough, and when he raised, it was partially mixed with blood. This continued to the time of his death. It would, and did have, a tendency to weaken him. Some one and a half or two years before he died, he was at our house frequently, and requested me to prescribe for this difficulty, and I did so. He told me that expectoration of blood had continued two and a half years before he died—a rusty colored, bloody expectoration." This witness visited him in his last illness, a very few days prior to his death.

Jno. Aiken : "Lived within one and one quarter miles of him ; saw him once a week ; never saw him spit blood, but heard of it." Witness noticed a general failing of his health, in June, 1866. He looked sick.

Eli Smith—brother-in-law of deceased : "Saw him spit blood in December, 1866."

Wayne Gallup : "Noticed failing of deceased for some time before he died, particularly in the last fall and winter. I talked with him in the winter, and he said he had been failing for some time and had been raising blood. Noticed his failing two or three months before that."

Eli Smith, son of deceased, testified to his spitting blood the summer before his death. "Saw him often a year or two before his death. He staid with witness then. It continued while he lived."

This is all the testimony, as to spitting blood, except plaintiff's proof that he spit blood in his last illness.

There is not a word of contradiction. The plaintiff, the son of the deceased, was examined, but was asked nothing on the subject. Had he not known of the blood spitting, it is clear he would have so stated.

The plaintiff knew that the defendant regarded this as a fact material to the contract. The question was distinctly put to the plaintiff, and plainly evaded. The matter was referred to the examining doctor, who knew nothing on the subject, as he had never attended the deceased. He falsely stated that he had had no physician, when he had been doctoring for shortness of breath, and this blood spitting, for months. This was told to prevent inquiry of his doctor.

Can any one pretend that the company did not regard this fact as material to this risk—to this contract?

This, then, was a palpable, fraudulent concealment of a material fact. It was also a plain untruth in stating that he was then in good health. He repeatedly spoke of his health as failing. So he appeared, and so continued till he died. The son, the plaintiff, was obviously the manager in this business. He signed the name of the deceased, though with his consent.

In my judgment, here is a plain fraud, clearly proved. Unless a different rule is to be adopted in reference to an insurance company, than prevails among others, this fraudulent attempt at speculation should not succeed. Such frauds, if successful, always beget others. They have followers. Besides, they confound all calculation of insurance companies for sound insurance, thus necessarily increasing their risks, and compelling honest applicants to pay higher premiums by reason of such dishonest practices.

The action of the Supreme Court was plainly right. It is their duty to set aside a verdict which is against the clear weight of the evidence, not merely, as this is, against the evidence. In deciding a case upon the facts, this court occupies the same position which

that court held upon this subject. Justice would be promoted if the Supreme Court should more frequently exercise its unquestioned right of reviewing verdicts upon the facts.

The order appealed from is affirmed, and judgment absolute ordered for the defendant.

"Peckham reads opinion for judgment absolute for defendant. All agree. Rapallo and Allen not voting."

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## COURT OF APPEALS OF NEW YORK.

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CAROLINE FRIED, *Respondent*,

vs.

THE ROYAL INSURANCE CO., *Appellant*.\*

The acceptance, by the defendants, of the proposition contained in the contract made by their agent, is conclusive of their assent to his authority to make the precise contract he did make.

The contract contained a proposition, on the part of the plaintiff, for insurance upon the life of her husband, and the usual premium for one year was paid in advance. The company, by their agent, agreed that if the proposition was accepted at the head office, they would issue a policy in accordance therewith, but if it was rejected that the premium should be returned; and that if the nominee should die before the decision of the head office was received, the amount of the insurance should be paid.

The proposition was accepted at the head office and a policy was forwarded to the agent, to be executed and delivered. It was executed by the agent, but on the ground of a change in the health of the nominee, was never delivered.

The general instructions of the company to the agent were that no policy should be in force or delivered until the premium was paid, and that if it should come to his knowledge that any change had taken place in the health of the assured, between the date of the proposal and the receipt of the policy, he should not deliver it until he had communicated with the company.

The acceptance of the company was absolute, and not qualified by the general instructions of the agent, which were not brought to the notice of the plaintiff. Such instructions could not alter or qualify the terms of the contract, to the prejudice of the plaintiff.

The contract of insurance was to take effect from the date of the proposal. If accepted, the risk of an unfavorable change of health, after that time, was necessarily assumed by the company.

The construction to be given to the instructions to the agent, in view of the language of those instructions; the terms of the contract; the situation of the

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\* Decision rendered November 11th, 1872.

parties and the objects to be attained ; must be most unfavorable to the party giving the instructions.

**Although the defendants failed to issue the policy according to their contract, they are liable upon the contract as a contract of insurance, and they are liable for damages for not delivering the policy.**

**The decision by the referee upon the question of fact, whether there was fraud in the original application or not, is conclusive upon this court.**

W. W. McFARLAND, *for Appellant,*

ROGER A. PRIOR, *for Respondent.*

CHURCH, CH., J.

There is no dispute that the agent had authority to make the precise contract which he did make with the plaintiff, and the acceptance of the proposition contained in it by the defendants is conclusive of their assent to the exercise of such authority in their behalf.

The terms of the contract are too clear for construction. It contains a proposition on the part of the plaintiff for insurance of the life of her husband, for which she advanced the usual premium for one year. The defendants by their agent agreed that if the proposition was accepted at their head office in Liverpool they would issue a policy in accordance therewith ; but if rejected they would return the premium. If the nominee died before the decision of the head office was received, the sum insured was to be paid in accordance with instructions. It was a present insurance in the event of death before the decision was received, and the only contingency upon which the contract of insurance could fail, was the rejection by the head office of the proposition, and the receipt of such decision before the death of the nominee. To this extent only the assured took the risk of a failure to consummate the contract. That contingency did not happen. The defendants receipted the proposition and forwarded a policy to their agent to be executed and delivered. It was executed by the agent, but never delivered, on the ground of an alleged unfavorable change in the health of the nominee.

It is now claimed by the learned counsel for the defendants, that no contract was ever consummated, that it was entirely optional with the company whether to accept or reject ; and that the acceptance must be qualified by the standing instructions from the company to the agent, the substance of which, as claimed, is not to deliver any policy if a change had taken place in the health of the assured. It is proper to observe that it is immaterial whether this is to be regarded as an action upon the policy or an action for damages upon the contract to issue a policy. The facts are sufficiently stated in the com-

plaint to recover on either ground under our system of practice, and I do not understand that any technical objection is made upon **this** point. The point insisted upon, as before stated, is that the **acceptance** was not absolute, but qualified by the general instructions of the agent. This position cannot be sustained, for two reasons. **First** : The instructions constituted no part of the contract and were **not** brought to the notice of the assured, and as claimed to be, are inconsistent with the terms of the contract. The contract is unqualified, that in case of acceptance by the head office, "a policy will be issued." If the alleged instructions are controlling, we must interpolate the words, "unless in the meantime a change shall take place in the health of the nominee." This would be a material alteration, and one affecting the substance of the contract. The contract of insurance was to take effect from the date of the proposal. If accepted, the risk of an unfavorable change of health after that time, was necessarily assumed by the company. Even death before the receipt of the decision of the company was expressly assumed by it. The assured took the risk that the application was in the prescribed form, and presented a proper subject for life insurance at that time, not that the nominee would continue in such a state of health as to be acceptable to the company for an indefinite period. The company was to act upon the papers presented, and they related to the condition of the nominee at the time they were prepared. If the papers presented showed a proper case for insurance, the risk of rejection by the company was very slight, while the risk of the health of the nominee for one, two or six months might be very serious.

In effect there would be no insurance unless the nominee continued in good health or died, until the policy was delivered.

The alleged instructions could have no such effect upon the contract. They could not alter or qualify the terms of the contract to the prejudice of the plaintiff. If the agent made a contract in violation of, or inconsistent with his instructions, the plaintiff had no notice of it, and the principals afterwards ratified it.

It is argued that having the power to accept or reject the proposal, the company might do either with qualifications. It is sufficient to answer that they did not make any qualification. The acceptance was absolute, and the supposed qualification is not binding upon the plaintiff so as to vary the terms of the agreement. It was competent for the company to make a contract in entire disregard of the instructions to their agent. They are chargeable with knowledge that this contract is inconsistent with what is now claimed to

be their instructions to their agent, and with that knowledge to have assented to it, and it is too clear for argument that they cannot set up the instructions to defeat it. It is a familiar principle that private instructions to an agent will not affect third persons. 4 Co., 645 ; [?] 23 Wend., 18 ; Story on Agency, 133. But this is a case where the principal assented to a contract inconsistent with the instructions. In the next place, I do not think the instructions will bear the construction claimed by the defendant's counsel. They are as follows : "No policy is to be in force, or is to be delivered on any account whatever until the premium be paid. If it should therefore come to your knowledge that any change shall have taken place in the health of the assured between the date of the proposal and the receipt of the policy, you will please to withhold it until you have communicated with the company on the subject."

This direction not to deliver a policy applies only to cases where the premium has not been paid. In such cases the application would be for a contract to commence at a future time. In other words, there would be no insurance, provisional or otherwise, until the premium was paid. In such a case it would be reasonable and proper that the applicant should then be satisfactory, but to apply this direction to such a contract as this, where the premium has been paid, would be unreasonable if not absurd. It would deprive the party of any insurance until the delivery of the policy. Such a construction is repelled by the clause, that in case of the death of the party before the decision of the head office is received, the sum insured shall be paid. It cannot be supposed that the parties intended to protect the plaintiff in case of the death of the nominee before the delivery of the policy, and not to protect her in case of an unfavorable change of health. Looking at the language of the instructions and the terms of the contract, the situation of the parties and the objects to be attained, and giving that construction to the language most unfavorable to the party using it, as we are bound to, the instructions produced in evidence have no application to this case. With those out of the case it is not claimed, but the acceptance by the company of the proposal consummated the contract.

The minds of the parties then met, and the mind of each was evidenced by an act upon which the other had a right to rely. The plaintiff said, I will give you so much a year to insure my husband's life, and pay you the first year in advance ; to which the defendants answered, I accept your proposal and receive your money,

and I will issue a policy. This is a binding contract within all the authorities. 6 Wend., 103 ; 36 N. Y., 307. Those cited by the defendant's counsel are not in conflict with these views.

Although the defendants failed to issue the policy according to their contract, yet they are liable, I think, upon the contract as a contract of insurance, and at all events are clearly liable for damage for not delivering the policy.

The decision by the referee upon the disputed question of fact, whether there was fraud in the original application or not, which is conclusive upon us, fixed the liability of the defendants in this case, and the judgment must be affirmed.

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## COMMISSION OF APPEALS OF NEW YORK.

SEPTEMBER TERM, 1872.

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*Appeal from General Term of New York Superior Court.*

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THE HOME INS. CO., *Respondents,*

vs.

THE WESTERN TRANSPORTATION CO., *Appellants.\** }

The assignors of the plaintiff shipped from Oswego, on defendants' canal boat, 5,720 bushels of wheat, to be delivered in good order to the consignees in New York city, the bill of lading stipulating that damage or deficiency in quantity was to be deducted from the charges by the consignees. The voyage was suspended, the latter part of December, at Fort Plain, and the wheat was found to be damaged by water. The defendants gave notice of the facts to the consignees, and they notified the plaintiffs, who had insured the cargo for them. Under the instructions of the defendants, the plaintiff's agent took charge of the cargo "for account of whom it may concern," and by consent of all the parties sold the damaged portion of the wheat and stored the remainder, and in the spring the sound wheat was delivered from the storehouse, upon the order of the defendants, and reshipped by them to New York, under the terms of the original bill of lading, and delivered to the consignees, who gave a receipt for the amount shipped, less the amount sold as damaged. At the same time there was a settlement between the consignees and the defendants, in which the defendants allowed for some bushels of wheat short, and \$50.00 "for general average."

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\* Decision rendered September Term, 1872.



The loss of the consignees, after allowing for salvage, was \$1,846.75. The plaintiffs paid the consignees the amount of their loss, and took an assignment of their claim for damages against the defendants.

The defendants claimed the \$50.00 was paid for the damage to the wheat, which is claimed in the action.

The referee in the court below found that the settlement did not include the damage to the wheat.

*Held*, that it was not proved how the damage was occasioned, nor that it resulted from any cause that would excuse the defendants from their liability as common carriers. Hence sufficient appeared to establish their liability. If they claimed that the wheat was damaged from inevitable accident, the burden was upon them to show it.

There was nothing to indicate that the consignees or the insurance company intended to discharge the defendants from payment of the damages to the wheat, when the agent received it at Fort Plain.

The \$50.00 paid at the time of settlement was not in satisfaction of the full amount of loss, but was probably taken by mistake from the carriers instead of from the insured, in accordance with a provision in the policy, that in case of loss, the insurers should pay the whole amount of loss, deducting \$50.00 instead of average.

The judgment against the defendants is probably too much by \$50.00, but cannot be rectified here, as the amount was not claimed in the court below, and no exception was taken in regard to it.

The finding of the referee, that the damage claimed in this action was not included in the settlement, is conclusive.

Appeal from a judgment of the General Term of the New York Superior Court, affirming a judgment entered upon the report of a referee in favor of the plaintiffs.

The action was brought by the plaintiffs, assignees of Messrs. L. Roberts & Co., against the defendants, as common carriers, to recover damages for injuries to 5,720 bushels of red wheat, shipped on the defendants' canal boat Denison, Nov. 23, 1860, at Oswego, to Messrs. L. Roberts & Co., New York city, and damaged by water, through the negligence of defendants.

The answer denied that the damage to the wheat was caused by the negligence of defendants, and averred that it was owing to the freezing of the Erie Canal, and the drawing off of the water of the canal by the State authorities.

It also averred a settlement of the cause of action by Messrs. L. Roberts & Co., the plaintiffs' assignors before their assignment to the plaintiffs.

The cause was referred to a referee, and upon the trial the following facts appeared :

On the 23rd of October, 1860, J. W. Smith shipped at Oswego, in good order and condition, on the defendant's canal boat Denison, 5,720 bushels of wheat, to be delivered in like good order and condition to L. Roberts & Co., consignees at the city of New York, they

paying freight and charges, it being stipulated in the bill of lading that damage or deficiency in quantity was to be deducted from the charges by the consignees. On the arrival of the boat at Fort Plain, in the latter part of December, 1860, she suspended her voyage, and the wheat was found to be damaged by water. The defendants gave notice to the consignees, and they notified the plaintiffs, who had insured the cargo for them.

Plaintiffs had an agent at Fort Plain, and defendants' agent at New York telegraphed plaintiffs' agent at Fort Plain, Dec. 27, 1860, to take charge of the cargo for account of whom it might concern. The defendants also sent an agent from Albany to Fort Plain, to act for them, and after conference with him, and by consent of all parties, plaintiffs' agent took the entire cargo, separated the damaged wheat, 1,781 $\frac{1}{2}$  bushels, from the uninjured portion of the cargo, sold it for the best price that could be obtained, and stored the residue. The wet wheat realized \$534.38, and the actual loss and damage sustained by the consignees on the wheat was \$2,461.98, less the salvage, leaving a net loss of \$1,846.75. In the spring of 1861, by consent of all parties, the defendants took the sound wheat, which had been stored, and re-shipped the same on another boat belonging to them, called the Northamptonshire, and brought the same to New York, where they delivered it to the consignees, under the terms of the original bill of lading. On the delivery of the same, May 9, 1861, the consignees gave the defendants a receipt acknowledging that they had "received fifty-seven hundred and twenty bushels of wheat, less seventeen hundred and eighty-one  $\frac{1}{2}$  bushels received by consignees at Fort Plain, from boat Lyman Denison." At the time this receipt was given, there was a settlement between the consignees and the defendants, in which the defendants allowed for some bushels of wheat short, and fifty dollars "for general average." This fifty dollars the defendants claim was paid for the damage to the wheat, claimed in this action. There was conflict in the evidence as to what the \$50 was paid for.

On the 20th of May, 1861, the plaintiffs paid the consignees the amount of their loss, and took an assignment of their claim for damages against the defendants.

The referee reported in favor of the plaintiffs, and found substantially the above facts, and also that the alleged settlement did not cover or include the damages claimed in this action. The defendants took various exceptions to the report, and appealed from the judg-

ment entered thereon, to the General Term of the Supreme Court, and then to this Court.

JOHN HUBBELL, *for Appellants.*

WILLIAM ALLEN BULLER, *for Respondents.*

EARLE, COM.

The plaintiffs in their complaint base their right to recover solely upon a cause of action alleged to have been assigned to them by L. Roberts & Co., and they must upon this appeal, as they did upon the trial, stand by the theory of their complaint.

It was admitted upon the trial that the wheat was damaged by water on the way to Fort Plain, before delivery, while in possession of the defendants as carriers. It was not proved how the damage was occasioned, nor that it resulted from any cause that would excuse the defendants from their liability as common carriers. Hence sufficient appeared to establish the liability of the defendants. If they claimed that the wheat was damaged from inevitable accident, the burden was upon them to show it. Angell on Carriers, secs. 188, 202, 472; King vs. Shepherd, 3 Story Cir. Co. R., 349; Hawkes vs. Smith, 1 C. & Marsh. R., 72. It is only necessary further to inquire whether the defendants were discharged from this liability by the delivery and receipt of the wheat at Fort Plain, or the alleged settlement made in New York.

1. It is claimed that L. Roberts & Co. voluntarily received the damaged wheat at Fort Plain, and that this discharged the defendants from all liability for damage to the wheat; and this claim is sought to be sustained by the case of Propeller Mohawk, 8 Wallace, 53. In that case Judge Nelson, after stating that in case the disaster to the cargo happened in consequence of one of the perils within the exception in the bill of lading, it is perfectly well settled that if the shipper voluntarily accepts the goods at the place of the disaster, or at any intermediate port, such acceptance terminates the voyage and all responsibility of the carrier, and that the master is entitled to freight *pro rata itineris*, further states as follows: "The same rule as it respects the effect of the voluntary acceptance of the goods at the place of the disaster or intermediate port, applies in case the ship is disabled or prevented from forwarding them to the port of destination by a peril or accident not within the exception in the bill of lading. The only difference between the cases is that inasmuch as in the latter the vessel is responsible for all damages that have resulted from the mis-

fortune to the cargo, the proofs of the acceptance of the goods at the intermediate port, in order to operate as a discharge of the vessel, should be clear and satisfactory. The mere acceptance in such cases, and nothing else passing between the parties, ought not to preclude the shipper of his remedy. It should appear from the evidence and circumstances attending the transaction that the acceptance was intended as a discharge of the vessel and owner from any further responsibility—what would be equivalent to a mutual arrangement expressed or implied, by which the original contract in the bill of lading was rescinded. The ground of the exemption from responsibility of vessel in both cases, is the voluntary acceptance of the goods at the intermediate port." After thus laying down the law, the learned judge reaches the conclusion upon the evidence that the acceptance of the goods in that case at the place of the disaster was voluntary, and with intent to discharge the carrier from all liability.

Here there was no such acceptance. All parties were notified of the detention of the boat and the disaster to her cargo. The general agent of the defendants at New York telegraphed to the insurance agent of the plaintiffs at Fort Plain, to take entire charge of the cargo of wheat "for account of whom it may concern." In pursuance of this telegram the insurance agent, with the knowledge and consent of the defendants, took the wheat from the boats, sold the damaged wheat, and stored the balance in a storehouse. In the spring the sound wheat was delivered from the storehouse upon an order of the defendants, and taken by them and carried to New York in fulfillment of their original contract to carry it, and was there delivered to L. Roberts & Co., the consignees. Here there was positively nothing to indicate that the consignees, or the insurance company, the plaintiffs, intended at Fort Plain to discharge the defendants from liability for the damage to the wheat. The defendants certainly did not understand that their original contract in their bill of lading was rescinded, because they took the wheat in the spring and carried it to its destination under that bill of lading. It would be quite preposterous to hold that because the insurance agent took possession of the wheat at the request of the defendants, and with the consent of the consignees and the insurance company, for the benefit of all parties interested, such acceptance, without more, should operate to discharge the defendants from their liability as carriers. To reach such a result, the proof should be quite clear and satisfactory. The defendants did not ask to be discharged, and what reason could have induced the consignees or the insurance company voluntarily to dis-

charge, without any consideration or compensation, a liability which seems to be undisputed for nearly \$2,000? The defendants are without any finding from the referee that the wheat was accepted at Fort Plain with intent to discharge the defendants. But he found simply that the consignees abandoned the wheat to the plaintiffs as insurers thereof, and that the latter took possession thereof with the consent of the defendants. In support of the judgment we must assume that the referee found, as he was authorized to upon the proof, that the acceptance was without any intent to discharge the defendants. The only effect, therefore, of the acceptance of the damaged wheat at Fort Plain, was to enable the defendants as carriers to charge *pro rata* freight upon it, and it did not discharge them from the liability sought to be enforced in this action.

2. It is further claimed that the defendants maintained, upon the trial of this action, their defence of settlement. It was proved that after the delivery in New York of the sound wheat, a clerk of the consignees and an agent of the defendants settled for the freight and towing, and that upon such settlement a deduction was made from freight due the defendants for deficiency in quantity of wheat delivered, and also "\$50 for general average." This settlement was made between two persons who knew nothing about the extent of the damage to the wheat, and without any figures or data from which they could ascertain the damage. It does not appear that the amount or extent of damage was talked over. While it is quite improbable that the \$50 was allowed and agreed upon as a satisfaction for the damage, amounting to nearly \$2,000, it does not satisfactorily appear what it was allowed for. Defendants' agent testified that it was allowed for the entire damage to the wheat. The clerk of the consignees testified that it was not allowed for that, but that it was a customary deduction in all settlements for freight in such cases, and he was confirmed as to the custom by the testimony of an insurance adjuster. But there is probably some mistake about it. The blank policy which I find in the case provides that in case of loss the insurer shall pay to the insured the whole amount of loss to the amount insured, "deducting in all cases, instead of average, \$50 on losses on wheat and other grains." This deduction would in all cases fall upon the assured, as his contribution towards the loss. It was this rule of deduction which the parties probably attempted to apply in this settlement. But by mistake they took the \$50 out of the carriers instead of the assured, and the result is that after allowing the \$50 as a de-

duction from their freight, the carriers are still adjudged to pay the full amount of the damage.

There can be no usage or custom which tolerates or sanctions this. The judgment against the defendants in this case is therefore probably too much by \$50, but we cannot rectify the mistake, as the allowance of the \$50 was not claimed on the reference nor upon the trial, and there is no exception which brings the question before us.

The evidence as to the settlement is quite vague and uncertain. To establish a settlement of so large a sum by the payment or allowance of such a small amount, it should have been clear and satisfactory. It is enough for us that the referee found that the claim made in this action was not included in the settlement. His finding upon this question is conclusive.

I therefore reach the conclusion that the judgment should be affirmed with costs.

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## UNITED STATES SUPREME COURT.

DECEMBER TERM, 1871.

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*In Error to the Circuit Court of the United States for the Northern District of Ohio.*

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THE PHOENIX INS. CO., OF BROOKLYN, N. Y.,  
*Plaintiffs in Error,*

vs.

VINCENT HAMILTON AND JOSHUA D. COOK.\*

Insurance was effected with the plaintiffs in error, in the name of the firm of Hamilton & Cook, grain commission merchants, against loss or damage by fire on "grain in store, their own, or held by them in trust or on commission, or sold and not delivered." Prior to effecting the insurance, Hamilton, one of the members of the firm, had retired, and Cook, by mutual agreement, was allowed to carry on business in the partnership name. No notice of the dissolution was given.

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\* Decision rendered November 18th, 1872.

The firm kept their consignments of grain in store in an elevator belonging to a railroad company, whose employees had the entire charge and care of it.

The interest of a nominal partner in the liabilities of the firm is such as should entitle him, in absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern.

The intimate connection of Hamilton with the business, and the fact that as between himself and the consignors, the railroad company, with whom the grain was stored, and all other persons dealing with it, he was actually a partner and incurred all the responsibility and risk attaching to that relation, constituted a sufficient basis of interest for effecting insurance in the name of the firm.

This case is an especially strong one, from the fact that the insurance was effected mainly for the benefit of the owners of the grain held on commission, and that the action was prosecuted solely for their benefit.

Policies are constantly applied for and granted on general stocks of goods held in trust or consignment for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that the insurers should be informed as to the ownership, and an omission to disclose it cannot be regarded as an improper concealment.

There was no error in the charge of the court below that if no misrepresentations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy; and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood to be by the defendants' agent, when the policy was effected, the omission to notify the defendants of the dissolution of the firm, was not a concealment which would avoid the policy.

Mr. Justice BRADLEY delivered the opinion of the court.

*Hamilton & Cook* were partners in the grain commission business at Toledo, Ohio, and kept their consignments of grain in store in an elevator at that place, belonging to the Michigan Southern Railroad Company, whose employees had the entire charge and care of it. Hamilton retired from the firm in July, 1867, but no notice of the dissolution was given, and by mutual agreement Cook was allowed to carry on the business in the partnership name until the end of the year. During this period, insurance to the amount of \$10,000 was effected with the plaintiffs in error in the name of the firm, *Hamilton & Cook*, against loss or damage by fire on the "grain in store, their own, or held by them in trust or on commission, or sold and not delivered," this being the usual method of taking insurance among commission merchants in Toledo; and the loss for which this action was brought by *Hamilton & Cook* occurred on the 21st of December, whilst the policy was running. The defense set up was, first, want of insurable interest in Hamilton, and, secondly, misrepresentation and concealment with regard to the interest. The case comes up on exceptions to the charge of the court, which was in favor of the plaintiffs below; and the principal question is, whether insurance can be

effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners.

Hamilton was a nominal partner, held out to the world as a member of the firm by his own consent, and affected with every liability of a partner—to consignors, creditors, and all persons dealing with the concern. The plaintiffs claim that this was a sufficient interest to support the policy, at least, in a commission business, where insurance was effected for the benefit of the real owners of the goods. It is objected that a nominal partner is only held such, adversely, for the purpose of subjecting him to liability as a partner and not for the purpose of giving him the benefits and advantages of a partner. But whilst this is generally true, the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern. As Chief Justice Jones remarked in *De Forest vs. Fulton Ins. Co.*, 1 Hall, 110: "It does not always require either the legal title or beneficial interest in the property to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure goods he contracts to convey, yet he has neither the legal title nor the beneficial interest in them, but he is responsible for their loss."

But the case of a nominal partnership carried on for the benefit of one or more members of the firm seems to be still stronger. For it may be said that the legal interest in the business is in the firm, whilst the beneficial interest is in the member or members for whose use it is carried on. In the case before us, as to all the world except themselves, the legal interest of the business was in the firm of Hamilton & Cook, the beneficial interest in Cook alone. And as it is well settled that a trustee or agent may insure the property held in that capacity for the benefit of all concerned, there seems to be no valid reason why persons constituting a nominal partnership should not be competent to effect insurance as well as transact the other business in the partnership name. In this case the intimate connection of Hamilton with the business, and the fact that as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attaching to that relation, constituted, in our judgement, a sufficient basis of interest for effecting insurance in the name of the firm. The doctrine, established by a number of cases, that nominal partners are proper plaintiffs as well as proper defendants in actions by and against the firm,



lends support to this view. See *Parsons on Partn.*, 134 ; *Story on Partn.*, §§ 241, 242 ; 1 *Smith's Lead. Ca.*, 1,190.

The case before us is an especially strong one, from the fact that the policy was effected mainly for the benefit of the owners of grain held by Hamilton & Cook on commission. The action was prosecuted solely for their benefit. The plaintiffs, on the trial, expressly waived any claim for grain belonging to themselves individually, and asked a verdict only for the value of the grain which was received on commission, claiming to recover this amount for the use and benefit of the owners. The liberality with which policies of this character, issued to trustees and agents for the benefit of parties really interested, are sustained by the courts, is stated and illustrated in the case of *The Insurance Company vs. Chase*, decided by this court in December Term, 1866. 5 *Wallace*, 509. As looking in the same direction, we may refer to the cases in New York which decide that a sale by a retiring partner to his copartners of his interest in the firm, is not a breach of the condition that the policy shall be void if the property is conveyed without the consent of the insurance company. See *Hoffman vs. Aetna Insurance Co.*, 32 *N. Y. Rep.*, 405, and cases there reviewed.

The other ground of defense was, that there was misrepresentation and concealment as to the interest, which vitiated the policy. It is laid down by this court in *The Columbian Ins. Co. vs. Lawrence*, 2 *Peters*, 49, that an applicant for insurance is bound to fair dealing with the underwriters, and, in his representations, should omit nothing which it is material for them to know ; nothing which would probably influence the mind of the underwriter in forming or declining the contract. This doctrine is repeated in several subsequent cases, and is undoubtedly the well-established law. But its application will depend upon the circumstances of each case. Generally speaking, it is undoubtedly true that any misrepresentation with regard to the ownership of the property insured will suffice to vitiate the policy. But policies are constantly applied for and granted on general stocks of goods, held in trust or on consignment for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that the insurers should be informed as to the ownership. They are content to insure for the benefit of whom it may concern. Of course, an omission to disclose the ownership in such cases cannot be regarded as an improper concealment. In some cases it is important for the insurers to know who is interested in the property, in order that they may form a judgment as to the probable

care which will be bestowed in its custody and preservation. In other cases this knowledge may be a matter of little importance. In the case before us, the grain insured was in the sole custody and care of the railroad company, and the insurers were little concerned, as, in fact, their agent made no inquiry who were the owners or interested therein; and no representation was made on the subject farther than to make the application in the name of Hamilton & Cook, and to ask for a general insurance on the grain in the elevator, whether their own or held by them in trust or on commission, etc. Under the circumstances of the case we do not see that anything material for the insurers to know, or that would have had a bearing on taking the risk or fixing the premium, was concealed or withheld. On this subject the court, at the request of the plaintiffs' counsel, charged the jury that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy; and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood by the defendants' agent when the policy was effected, the omission to notify the defendants of the agreement of dissolution could not be considered a concealment which would avoid the policy. Under the circumstances of the case, we do not think there was any error in this charge.

The judgment is affirmed.

Dissenting, Mr. Justice Clifford.

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## COURT OF APPEALS OF NEW YORK.

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*Appeal from General Term of Supreme Court.*

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ISAAC C. OGDEN, *et al.*, Respondents,

vs.

THE EAST RIVER INS. CO., Appellants.\*

The clause in policies of insurance, providing for an apportionment of the loss in case of other insurance, is a part of the contract, and must receive a reasona-

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\* Decision rendered December 3rd, 1872.

ble construction. The rules governing contribution among insurers, cannot be engrafted upon it.

*Opinion in Howard Ins. Co. vs. Scribner et al.*, that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause, overruled.

The rule for apportioning the loss, in case of over-insurance, when several parcels of property are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, is that the sum insured by the first-mentioned policy is to be distributed among the several parcels, in the proportion which the sum insured upon each parcel bears to the total value of all the parcels.

The defendant issued a policy for \$3,000.00 upon a parcel of property, worth \$16,000.00. There was other insurance for \$47,000.00 upon this and other parcels of property insured together. The value of all the property covered by the other insurance was \$88,000.00. All the parcels of property covered by the defendants' policy and by the other insurance was destroyed.

In case of a total loss, each parcel covered by the insurance, other than the defendants', should be deemed insured for  $\frac{1}{2}$  of its value, and the parcel covered by defendants' policy, for  $\frac{1}{8}$  of its value.

In this case there was no over-insurance, and consequently there is no occasion for any apportionment.

RAPALLO, J.

The clause now usual in policies of insurance which provides for an apportionment of the loss, in case of other insurance on the property, is a part of the contract and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, or to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself and construe it as we would any other stipulation between the insurer and the insured.

We cannot adopt the view taken of this clause in the case of *Howard Ins. Co. vs. Scribner*, 5 Hill, 298, where it was held, in analogy to the rule in actions for contribution, that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause; in either case, we agree to the doctrine contended for by the counsel for the appellant, that the whole sum insured by the more comprehensive policy is to be considered as so much additional insurance upon the parcel separately insured.

Where several parcels of property are insured together for an entire sum, it is impossible to say, as to either of the parcels, that there is no insurance upon it, neither is it reasonable to assume that any of the parcels is insured for more than its value when the whole sum in-

sured is less than the aggregate value of all the parcels covered by the policy. The difficulty lies in determining what part of the whole sum insured is to be deemed applicable to either parcel, when the policy itself makes no separation.

If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance, p. 36, No. 1,263 a, and in *Blake vs. Exchange Mutual Ins. Co.*, 12 Gray, 265, carries out the intent of the clause and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is in substance, that for the purpose of apportioning the loss, in case of over-insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first-mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by the policy bears to the total value of all the parcels. Thus in round numbers the sum insured in this case by the policies other than the defendant's on the property as an entirety was \$47,000. The total value of the property covered by these policies was \$88,000. In case of a total loss, each parcel should be deemed insured thereby for  $\frac{47}{88}$  of its value. The parcel separately insured by the defendant was worth \$16,000, and was insured by the defendant for \$3,000, which was equal to  $\frac{3}{16}$  of its value. It is manifest that there was no over-insurance, and that consequently there is no occasion for any apportionment.

Whether this would be the proper rule in case the \$16,000 parcel alone had been destroyed or damaged, it is not now necessary to determine. In that event, if the defendant's policy had not existed, the whole loss would have been recoverable under the \$47,000 insurance. It may be that the rule for ascertaining the amount of insurance upon any particular parcel when insurances are commingled, as in this case, is dependent upon the extent of the loss, and that whatever could be recovered upon the more comprehensive policy, without regard to the other, is the amount to be deemed insured thereby on the part injured, in case of a partial loss, and that on that basis an over-insurance to the extent of the separate policy might be established. By insuring several parcels of property for an entire sum the insured obtains the advantage, and the insurer subjects himself to the liability of having so much of the total sum insured as may be necessary to compensate for damage to any part of the property applied to that part, though the sum named in the policy would have been insufficient to cover the loss, if the whole had been destroyed. Thus it is

left to the result, in case of a partial loss, to determine what sum is insured upon any particular parcel, the only limit being its value. On the other hand, it would be desirable to adopt a general rule, applicable to all contingencies. We refrain from expressing an opinion now upon the several phases which might be developed under an insurance of this character in case of partial loss, confining our adjudication to the case before us, which was that of a total loss of the whole subject insured by all the policies.

The judgment should be affirmed with costs.

All concur. Judgment affirmed.

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## SUPREME COURT OF NEW JERSEY.

FEBRUARY TERM, 1872.

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HENRIETTA HILLYARD *et al.*

*vs.*

THE MUTUAL BENEFIT INS. CO.\*

The defendants, a corporation created by the laws of New Jersey, before the war, issued a policy for the benefit of the plaintiffs, upon the life of their father. The policy contained a provision that in case the trustee should not pay the annual premium, on or before the days therein mentioned for the payment thereof, the company should not be liable for the payment of the sum insured, or any part thereof; that the policy should cease and determine; and that all previous payments should be forfeited. The plaintiffs and the father were residents of Virginia. The payment of the annual premiums was intermitted during the civil war, and the life insured terminated during such intermission. A tender of the premiums was made after the close of the war.

A war, either foreign or domestic, puts an end, during its continuance, to all amicable intercourse between the citizens of the respective belligerent powers. All contracts made with an enemy during war are void, and all payments of debts or remission of funds during war are illegal and forbidden.

The payment of these premiums, at the stipulated times, became legally impossible. If they had been tendered, the defendants could not, without doing an unlawful act, have received them.

The exact performance of this contract, on the part of the assured, has been rendered impossible by the act of the law, and as such occurrence was not a con-

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\* Decision rendered June 18th, 1872.

tingency which can reasonably be supposed to have been within the contemplation of the contracting parties at the time they bargained, this failure in a strict compliance is not a legal breach of the agreement.

The reasonable and true doctrine seems to be that express terms are necessary to create an obligation which will include a liability, in case of an unanticipated prevention, by the act of God or of the law, of the fulfillment of a stipulation.

The payment of the several premiums on the contract days was excused, from the fact that such payment was rendered impossible by the war.

When the subject matter of the contract does not become unlawful, and it has been in some degree executed, so that the parties cannot be restored to their original condition, the contract, although for the time being some of its terms are not capable of performance, is not in a posture to be rescinded either in whole or in part. When such a result is not absolutely inevitable, and where it would lead to injustice, it does not take place.

Whenever the law interferes with the contract, it should be held that such interference will disturb the intentions of the contracting parties to the least degree practicable.

The tender of the premiums was, in legal effect, a compliance with the plaintiffs' stipulations in that respect.

The defendants, by the interdict of their own government, were disqualified during the war from receiving the premiums, and a tender of the money by the plaintiffs must, of necessity, have been rejected by the defendants. They cannot be permitted to impute a result, occurring from their own incapacity, as a breach of agreement on the part of plaintiffs.

A continuing contract, which has been partly performed, and which will remain in force from its own intrinsic quality, without the doing of anything by any party to it, is not avoided by the occurrence of the war. As the payment of the premiums was suspended, the continuance of the contract in question was not dependent on the doing of any act, on the part of the company or of the assured, and the contract was not annulled.

Debts due from a citizen of this country to an enemy, are not liable to forfeiture on the breaking out of hostilities, except by the action of Congress. Much less can a vested right, such as arises out of the present policy, be forfeited by the operation of the war for the benefit of one of the contracting parties.

The continuance, during the progress of a war, of insurance on the life of an enemy, is not inconsistent with the welfare of either of the belligerents.

A stipulation that the money should be payable, even though the life insured should be lost in a war, which might arise between the States of the assured and the insurer, would be clearly illegal and void, and no such provision, which if present would vitiate the whole agreement, can be understood to be comprehended in the general expressions, which are in common use in these policies. An exception is invariably implied, embracing every case of a loss of life by any means concerning which it would be criminal or incompatible with the law or against the public interest to stipulate or bargain.

This action was properly brought in the name of the plaintiffs. The general rule is that the suit may be brought, on these policies, when in the form of simple contracts, in the name of the party having the beneficial interest. The agent, who effected the insurance, is styled a trustee, but that does not make him such, as his powers and capacities appear to be those simply of an agent.

If, under the incorporation of the company, the plaintiffs, as holders of a policy, became partners with the other corporators, the war did not dissolve such partnership, and such dissolution, even if it took place, would not affect the obligations of the policy.

This was a suit on a policy of life insurance, dated 27th December, 1849. The plaintiffs were the daughters of John H. Hillyard, and

their respective husbands, and the declaration stated that being interested in the life of their father, they, by one Edwin Hillyard, their trustee and agent, entered into an agreement with the defendants in and by which said agreement it is recited that the said defendants, in consideration of the sum of \$302.50, to them in hand paid by Edwin Hillyard, trustee, and of the annual premium of \$302.50, to be paid on or before twelve o'clock, M., on the twenty-seventh day of December, in every year during the continuance of that policy, do assure the life of John H. Hillyard, of Richmond, in the County of Henrico, State of Virginia, (meaning thereby the father of the last named plaintiffs,) in the amount of five thousand dollars, for the term of life, etc.

Among the conditions expressed in the policy was the following one, viz: that in case the said Edwin Hillyard, trustee, should not pay the said annual premiums on or before the several days therein before mentioned for the payment thereof, then, and in every such case, the said company should not be liable to the payment of the sum insured, or any part thereof, and that the policy should cease and determine; and that it was thereby further agreed that in every such case, where the policy should cease and become null and void all previous payments made therein and all profits should be forfeited to the said company.

It was then stated that the trustee paid the annual premiums "up to and until" the twenty-sixth day of December, 1861, that for a long time before and after that date the plaintiffs and the said trustee were inhabitants of Virginia, and the defendants were inhabitants of the State of New Jersey, and that on the first day of December, 1861, the President of the United States, by virtue of the power and authority in him vested, and according to the statute, etc., had by his proclamation, bearing date, etc., declared that the inhabitants of the said State, so as aforesaid inhabited by the said plaintiffs and their said trustee, and the section or part of the said State so inhabited by them, were in a state of insurrection against the United States; and that the said proclamation remained in force, and the state of insurrection and condition of hostility therein declared to exist, continued for a long space of time, etc., by reason whereof all commercial intercourse, etc. continued to be unlawful and impossible; and during all that time hindered the payment of said annual premiums.

The declaration then alleged a tender after the war.

There was a general demurrer to this declaration.

BEASLEY, CH. J.

This suit is on a policy of life insurance made by the defendants, a corporation created by the laws of this State, in favor of the plaintiffs, who were residents of the State of Virginia. The person whose life was insured was also a resident of this latter State. The payment of the annual premiums was intermitted during the recent civil war, and the life insured terminated during such intermission. The policy contained the usual clause, that in case the annual premiums should not be paid on or before the days designated, the company should not be liable to the payment of the sum insured, and that the policy should cease and determine. It was this last provision which gave rise to the first objection to the present action, taken on the argument before this court.

The declaration admits that the premiums were not paid according to the terms of this stipulation, and that the death occurred during the period of such non-payment. The existence of the civil war is relied upon as an excuse for this default.

No one, at the present day, can doubt that a war, either foreign or domestic, puts an end, during its continuance, to all amicable intercourse between the citizens of the respective belligerent powers. In this respect all the judicial decisions, as well in England as in this country, agree with the opinion expressed by the publicists, and with the practice of all civilized nations. The interdiction extends to every species of friendly communication. All contracts made with an enemy during war are void, and all payments of debts, or remission of funds, under similar circumstances, are illegal and forbidden.

As the doctrine is expressed by the English jurists, there cannot exist, at the same time, a war for arms and a peace for commerce, the principle being that the belligerent condition places every individual of the respective governments, as well as the government themselves, in a state of hostility.

By force of this rule the payment of these premiums, at the stipulated times, became legally impossible. If they had been tendered, the defendants could not, without doing an unlawful act, have received them. Both the payment and the receipt of the moneys would have been a breach of duty and of law. The question is whether the act of payment, having become thus illegal, the performance of such act was not excused.

The exact performance of this contract, on the part of the assured, has been rendered impossible by the act of the law, and as such oc-



currence was not a contingency which can reasonably be supposed to have been within the contemplation of the contracting parties at the time they bargained, I think this failure in a strict compliance is not a legal breach of the agreement. The reasonable and true doctrine seems to be, that express terms are necessary to create an obligation which will include a liability in case of an unanticipated prevention, by the act of God or of the law, of the fulfillment of a stipulation. In the absence of such an expressed intention there is always an implied understanding that the doing of the act agreed to be done shall not become absolutely impracticable from a remote and unexpected event occasioned by a natural or legal agency.

This rule, as well as its conditions and limitations, is clearly marked in the judicial decisions, and, as an ancient illustration, I refer to the case of *Lawrence vs. Twentiman*, 1 Roll. Abridg., 450. Condition G., pl. 10, where it was ruled that if a man covenant to build a house before a certain day, and the plague breaks out in the place where the house is to be built before the day, and continues until after the day, the covenantor is excused from the performance of the covenant at the day, for the law, it is said, will not compel him to venture his life, but he may do it after. Another example occurs in *Williams vs. Lloyd*, W. Jones, Rep., 179, in which the declaration stated that the plaintiff delivered a horse to the defendant, which the defendant promised to redeliver on request, and a defence was sustained which set up that the horse died before a request to redeliver him. *Ld. Coke*, 1 Inst., 206, a, b, expresses the same rule, saying that where the condition of a bond or recognizance becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved, as if a man be bound by recognizance or bond, with condition that he appear at the next term of such court, and before the day he dieth, the recognizance or obligation is saved.

This rule, as thus expounded, was applied and enforced by the Supreme Court of New York in the case of the *People vs. Manning & Condit*, 8 Cowen, 297; and its existence is very pointedly recognized by *Ld. Ellenborough* in *Barker vs. Hodson*, 3 Man. & Sel., 271. The doctrine was much discussed and considered in the modern case of *Hall vs. Wright*, El., B. & El., 746, (96 E. C. L. R.,) which was an action for breach of promise of marriage. And in the several opinions read in the case it seems to be either expressly stated, or impliedly assumed, that if the performance of the promise had become impossible by the act of God, as by a visitation of grievous sickness, it would have been an excuse for non-performance.

It is true that in judicial dicta and in the works of some of the text writers it is affirmed, as a general rule or principle of law, that whenever a party enters into an unqualified agreement to do some particular act, that the impossibility of performance, occasioned by inevitable accident, or an unforeseen occurrence over which he had no control, will not release him from his contract. Mr. Addison, in his treatise on contracts, thus declares the law ; but an examination of the cases cited will show that the deduction made by him is not warranted. The examples adduced are all cases of difficulty, and not of impossibility of performance.

This erroneous statement of the rule, erroneous on account of its universality, seems to have proceeded from the leading case of *Paradine vs. Jane*, Aleyn, 26, in which the distinction is drawn between such duties as the law charges upon a party, and those which he voluntarily assumes. The difference being that it is only in the former class of cases that non-performance will be excused when it arises from inevitable necessity. The reason given for this discrimination is, that in instances of self-assumed obligations provisions should be made for the contingency set up as an excuse for non-compliance with the express stipulation.

The rule in the case cited is expressed in too general terms, but limiting it, as it should be limited, by its application to the facts to which it belongs, it is correct. The action was in debt for rent, and the defendant pleaded that he had been expelled from the premises demised, and from the profits, by the public enemy. Obviously, this was not a case of impossibility of performance, for it was simply a hardship for the tenant to pay rent when no benefit had accrued to him from the property.

There could be no reasonable inference, from the conditions of the case, that the parties intended that the rent was not to be exacted in the event of the possession of the premises being lost to the tenant.

Whether a contract is to be operative, in the event of performance becoming impossible, is a question as to the intention of the parties.

There are few contracts, if any, which express in terms the full meaning of the contractors under all possible circumstances, and hence the limitations and incidents which the law so often supplies. It is not intended to be questioned that when a contract is made in intelligible terms, which are sufficiently specific, the law will neither add to nor take anything from it ; but when general terms only are used, and remote contingencies arise, rendering a strict compliance impossible, it then becomes obvious that to give full effect to such

general terms would often be to lend them a force which might lead to injustice, and to result quite aside from what was contemplated. For example, if a man promise, in an unqualified form, that he will write a certain treatise, or paint a certain picture within a given time, it would hardly be denied that his death before the lapse of the period would excuse his non-compliance with the very terms of his agreement.

This limitation of the language used would be deduced from the nature of the undertaking, which requires for its performance the personal services of the promisor, and from the consequently well founded inference that it could not have been intended to regard the contract as broken if death intervened. Such promise is unconditioned and absolute, but its generality is restrained by an implication which belongs to the very substance of the transaction.

On the other hand, as an illustration of the opposite class of cases : When a tenant agrees in an unrestricted form to pay a certain rent, he will not be released by a destruction of the premises from natural causes, the reason being that such casualty is not unusual, and was therefore probably within the contemplation of the contracting parties, and performance, though a hardship, is not impracticable.

The distinction is, I think, a plain one, and establishes a rule which is indispensable, if courts are to enforce the real design and will of those who impose duties on each other through the medium of agreements. It is so seldom that persons would be willing to bind themselves for the consequences of a breach of contract occasioned by the act of God or that of the law, that I think that it is safe to lay down the rule, that such an obligation will not be deduced from general terms, but that a specific stipulation is necessary to produce such a result.

A strong case in favor of controlling a stipulation, couched in general language, is afforded by the decision of *Ld. Ellenborough*, in *Brandon Curling*, 4 East, 417.

The suit was on a marine policy, containing the usual clause of indemnification against all captures and detention of princes. The vessel had been taken by the government of the underwriter, and the decision was to the effect that the insurance, though general, must be considered as containing an exception against a loss happening during the existence of hostilities between the respective countries of the assured and assurer. I cannot find that it has ever been ruled that if the performance of a promise turns out to be impossible, without the fault of the promisor, that the performance will not be ex-

cused, unless the contract, in express and specific terms, provided for the event occasioning the impossibility.

Applying this rule to the facts now under judgment, I conclude that the intermission of these payments was excused on the ground of necessity, and because the parties did not contemplate the occurrence of such necessity, and consequently did not provide for it. It is very unreasonable to infer that it was the intention that a forfeiture should be incurred if the insured, by no fault of his, but from the intervention of the law, failed to fulfill his contract, with respect to punctuality of payment, according to the view of the defendants, and regarding this stipulation as unqualified if the assured, on one of the days for annual payment, being on his way to settle the premium, had been taken with a sudden sickness, and had remained in a state of insensibility until the time for payment had passed, all his interest in that policy would have been irretrievably forfeited. So unreasonable a force should not be given to this provision.

In my opinion the payment of these several premiums on the contract days, was excused from the fact that such payment was rendered impossible by the war.

The true meaning of the agreement, read in the light of its necessary implications, is that the premium was to be paid at the times specified, unless prevented by the act of God or of the law. A legal interdict was temporarily imposed on such payments, and the effect was to suspend the obligation to pay; but such suspension did not affect the obligations of the defendants. To hold that the liability of the defendants was suspended, would be to declare a forfeiture *pro tanto*.

When the subject matter of the contract does not become unlawful, and it has been in some degree executed, so that the parties cannot be restored to their original condition, the contract, although for the time being some of its terms are not capable of performance, is not in a posture to be rescinded either in whole or in part. When such a result is not absolutely inevitable, and when it would lead to injustice, it does not take place. Whenever the law interferes with the contract, it should be held that such interference will disturb the intentions of the contracting parties to the least degree practicable.

[Concluded in March Number.]

## MISCELLANEOUS DEPARTMENT.

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### QUALIFICATIONS NECESSARY FOR A SUCCESSFUL LIFE UNDERWRITER.

BY NATHAN WILLEY.

Until recently it has been the common impression that the business of life insurance, and especially the management of a company, was one which required no special preliminary training. Most of the new companies of the last ten years have been organized and managed by men who have been unsuccessful in other pursuits, and have regarded life insurance as a promising field, where all they needed to make a prosperous company was the capital stock, as required by law, and an office in which to write the policies. The stock has generally been obtained from the personal friends of those who expected to be pensioned off with a comfortable salary, and who have been promised a share in the profits, or to be accommodated with the loans which result from the accumulation of funds seeking investment; and the brilliant prospects caused by high commissions and lucrative contracts have usually found a class of agents who were willing to press the advantages and special features of any company without making a careful inquiry into the qualifications of those who were its officers and managers. It is not surprising that companies organized on such principles have not succeeded better. The long and ominous list of those which have recently been compelled to reinsure their risks, and the want of prosperity which attends some others, leads us to inquire what qualifications are necessary for the officers of a company to have, in order to inspire the public with confidence, and obtain the amount of new business which is necessary for their success.

The first of these which we shall notice is a clear and accurate knowledge of the fundamental principles on which life insurance is based. The science of life contingencies depends upon certain propositions, which long experience and patient investigation have proved to be mathematical truths, and a knowledge of them is of the utmost importance. Any persistent deviation from them is sure to cause

great damage to a company. In many, not a day passes but something occurs which makes a knowledge of them necessary. Not a contract is made with an agent, but the question of his commissions must be considered in relation to the effect they will have on the surplus or assets at the end of the year ; not a surrender value is paid for a contract of insurance, but the inquiry is made, what does the policy holder expect is his due, and how much can the company afford to give without detriment to the remaining members? and not a premium rate is computed but the question arises, is it safe and profitable? Officers without any special training seldom investigate these subjects for themselves ; they are satisfied to follow the lead, as far as they know how, of older and more successful companies ; and by attempting to rely upon their experience, they adopt more of their errors than of their good qualities. Agents very soon learn that they are men to whom they can dictate their own terms for commissions, and the policy holders, finding that the company fails to fulfill the promises made by the agents and indorsed by the company, become dissatisfied and allow their policies to lapse. The general management of a company involves many purely scientific questions, as much as the manufacture of chemicals or navigating an ocean steamer, and only those companies can succeed whose officers habitually recognize this truth. It is also a fatal mistake, and one which is too often made by officers as well as the public, to suppose that a large volume of new business is an evidence of solid prosperity ; as well might one say that a great amount of real estate, mortgaged to nearly its full value, is an evidence of wealth. It is the business of a life insurance company to assume contingent debts, and at the same time to hold a reserve sufficient to discharge them ; but if its premiums are procured at too great an expense, its increase of business may be fatal to its success or solvency. An officer should know, and not conjecture, where is the limit of safety. Again, there are two classes of persons to be considered : the policy holders, who must be liberally treated and who must be certain of the ultimate success of the company, and the agents and officers, who too often care for only their own commissions and salaries. Unless an officer knows where the dividing line ought to be between these two, and has the firmness to abide by it, he is not fully qualified for his position.

There are other branches of knowledge and qualifications which are scarcely less important to a life underwriter. Hardly a day passes in a large company but some question of law must be decided, some inter-



pretation of a contract, some question relating to the investment of funds, or pertaining to real estate, needs explanation. It often happens that these can be decided without referring them to an attorney, and if the underwriter has the general principles of law firmly fixed in his mind, his reputation and usefulness will be greatly increased.

The science of accounts is another subject which is of great importance. It is injudicious and unsafe to leave this matter wholly to the care of clerks and bookkeepers. The president and every executive officer of a company should be so familiar with the books of the company and the practice of bookkeeping, that they can easily tell whether they are correctly written up.

It is not necessary for an officer to be a medical expert, but he should be familiar with the general laws which regulate health and longevity, and should be able at any time to give clear and correct views upon the sanitary condition of different localities, and the peculiar diseases incident to them, and the influence of different trades and professions on human life. All these topics should be familiar to him, so that in all his correspondence with agents and his intercourse with employees, he may be able to impress them with the fact that he is fully prepared for any exigency, and that it is useless for them to urge him to adopt any plan or new feature which will not bear the test of careful examination.

He should have some practical knowledge of the duties and difficulties of the agency. Successful soliciting requires men of peculiar tact, and that officer who can decide intuitively whether a man will make a successful agent or not, will save the company a great amount of expense. He should know how to advise agents in all their difficulties, to guide, stimulate and encourage them under all circumstances. His visits to the different agencies should be followed by an increased energy in obtaining applications and greater confidence in the success of the company, and in all his intercourse with agents he should make them feel that he is perfectly familiar with every agency under his care.

Finally, there are some business qualifications which are indispensable to a successful life underwriter. He should be a man of system, energy and perseverance. He should have the power to inspire men with confidence in his integrity, so that they will feel safe to trust their money in his hands; he should be sufficiently progressive to accept anything new which is of a real and substantial benefit, and conservative enough to reject everything which will not bear a rigid scientific examination, and he should be able to convince the public

that his company is managed on solid conservative principles, and that its policy holders may look forward to a lifetime of security in the protection which it affords.

If these views are correct, can we not see the reason why so many companies have gone out of the field ; that there is hardly a vocation, with the exception of some of the learned professions, which requires more careful study, more general knowledge, more business capacity and executive ability, or a better reputation for honor and integrity, than the management of a life insurance company, and that the disastrous reign of empirics is soon to come to an end ?

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#### TONTINE INSURANCE.

Among the various temporary expedients to which many life insurance companies have of late, by reason of the declining state of their business, found it necessary to resort, the Tontine plan appears to have been regarded with especial favor, as the one most available for popular effect. As a financial device it is historic, dating back as far as 1648, and as an adventure it has in a few instances been adopted by men of wealth for special investment of money based on the consideration of a life annuity with the benefit of survivorship. About the middle of the 17th century it was introduced into France by the inventor, Lorenzo Tonti, a Neapolitan, as a scheme of government finance. It was once resorted to by the government of England, and occasionally Tontine associations have been formed for various private purposes both in Europe and America, but without large success. Within a few years the Tontine principle has been engrafted on life insurance by some of our American companies. The argument offered in its support is that it tends to a more equable distribution of cost of insurance between the early decedents on the one hand and the surviving members on the other than is effected by the ordinary graduated premiums ; that those members who die early can well afford to relinquish their portion of the accruing surplus for the benefit of those who outlive them, since they secure a large advantage to their estates at small cost, having paid but few premiums, and that the surviving members, who pay a large number of annual premiums, are fairly entitled to reimbursement of a part of



their outlay from the early dividends and from forfeitures. It is further represented that financially it will be a very profitable adventure to those who live and continue their insurance to the end of a specified term of years.

The manner in which the equalization of cost is proposed to be effected is by creating a reversionary fund for the benefit of those members of the Tontine class who outlive the term and who continue to keep their policies in force. The revenues from which this fund is to be derived are the surplus that may arise from the several Tontine policies, known in mutual companies by the name of divisible surplus, and the forfeited reserves of such policies of this class as lapse by non-payment of premiums before the expiration of the Tontine term. It is expected that the revenue from this latter source will be very large. At the end of this term the fund thus constituted, with its interest accumulations, is to be distributed *pro rata* among the surviving members of the class in such way as they may elect, in cash, in reduction of future premiums, or in increased insurance.

After the distribution, the policies thus taken will stand in the company on the basis of ordinary policies of the same tenor, but it is supposed that the surplus accruing upon them thereafter will be so large as to make the continuance of that form of policy unprofitable. In the event of the death of a member, before the expiration of the Tontine term, his heirs shall be entitled to receive the full amount for which he was insured, but without benefit of any portion of the Tontine reversion; but this term is usually so determined that the amount of the insurance realized, even in the case of the last decedent during the term, may never be less than the sum of all the premiums that have been previously paid by him, accumulated at ten per cent. interest.

The plan, the argument, and the appeal, by which it is urged upon the public, bear such an aspect of plausibility and such promise of advantage that an unsuspecting mind might be easily made to believe that it is a valuable improvement in life insurance, yet when it is observed that the scheme has in most cases been resorted to as an expedient to create a new excitement under the pressure of a threatened decline of business; that many of our oldest and best companies have not adopted it, and that some actuaries of eminent learning and ability have expressed their disapproval of it, it will appear that the merits of the plan are not such as to entitle it to an unqualified recommendation, and a careful reflection will show that there are adverse considerations which are of so great importance that they out-

weigh all the specious pretensions and promises of advantages which are held out by the advocates of the system.

In the first place it is to be considered that the Tontine policy suspends the payment of the annual dividends, and abolishes the right of the policy holder to call upon the company for the surrender value of his policy during the whole of the Tontine period, which may be fifteen years or more. In ordinary insurance, a person not only participates in the annual surplus, but if he is poor, or is under a cloud of misfortune, he may, on being compelled to stop payment, call back in cash, with a small deduction, the value of his policy; but in the Tontine insurance, failure to pay any premium on the day it becomes due, even though it be the last one of the series, works forfeiture of the whole.

A second suggestion, which is inferential from the foregoing, is that the Tontine insurance is a snare in which the poor, and men of moderate and uncertain income, should not allow themselves to be entangled, for it is certain from experience that nine out of ten who are in this condition will lose by the adventure; yet they are the very persons who are most liable to be fascinated by it through the representations of unscrupulous agents. Another inferential suggestion is that it is an act of questionable morality in a life company to offer the temptation to the public, knowing full well that the forfeitures, which are relied upon for making up the greater part of the survivorship fund, will be derived from those persons who have been disabled by poverty or misfortune, for it is certain that none will suffer their policies to lapse but such as are compelled to do so by the pressure of necessity. Another very grave consideration is that as the rich only can hope to carry their premiums along to the end of the term, they alone will reap the benefits of the system, and thus the system is seen to be one which is eminently calculated to aggrandize the rich and to impoverish the poor.

It is unquestionably true that the poor have the right to run into hazardous adventures equally with the rich, but whether it be consistent with the dignity and honor of a life company, or with the law of morality, to encourage men to do this by taking a form of insurance which depends for its popularity mainly upon the known and even advertised fact, that the company expect to make large profits for them by inducing many persons to enroll themselves in the class, who will certainly break down before the time expires, is a question which the common sense of mankind may easily answer.

Let it further be considered that the motive to which the company



appeals in behalf of the Tontine plan, and upon which it bases its expectations of success, lies in the strength of the selfish principle in the human breast, the same that engenders in many persons the greed for speculation, lawful or unlawful, and for gambling adventures—a motive that always tends to the secret demoralization of all nobility of mind and character—and it will readily be seen that the plausibility of the argument in favor of the plan consists in the concealment of the objectionable methods by which the object of the plan is proposed to be secured.

It would be easy to extend this line of criticism into other specifications, such as the corruption of pure insurance by the addition of the evil elements of speculation and gambling, which are foreign to its nature, and the possible infringement of the laws restraining companies of this kind from engaging in banking and other financial operations, thus making insurance the vehicle of various sorts of money transactions for the sole purpose of enriching the managers and increasing the current revenues and the funded investments of their companies ; but resting the case at this point, enough has been said to show that there are very many adverse considerations of a grave character, which utterly forbid the approval of this system of life insurance. No doubt these considerations have been duly weighed by those managers of life companies who have thus far refused to incorporate the Tontine principle into their plans of insurance, and that in refusing to adopt it, they have been actuated by an honorable determination to maintain the purity of insurance by keeping it within its legitimate province, and to preserve it from every corrupting alliance.

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#### CASES REPORTED.

This number of the JOURNAL contains a full report of the decisions in eight insurance cases, besides that of *Reynolds vs. The Commercial Ins. Co.*, which is concluded from last number.

In the case of the *Mutual Benefit Life Ins. Co. vs. Miller*, the policy provided that if the declaration made by the applicant should be found untrue, the policy should be null and void ; and the declaration stipulated that the answers of the applicant should be the basis of the contract. The Supreme Court of Indiana decided that the policy, the declaration, and the answers of the assured were to be regarded as one instrument ; that a covenant or agreement, to become a war-

ranty, need not appear on the face of the policy, but may be on a paper referred to in the policy ; and that the answers must be held to be warranties, on the part of the applicant, that the facts were as stated by him. The court also held that if the applicant had had spitting of blood before the time of his application, he was bound to mention it in his answer to a question on that point ; that the fact that he was examined by a surgeon employed by the company for that purpose was no excuse for his not having done so, and that it made no difference whether a misstatement was intentional or not. The defence on the part of the company was that the answers of the assured, in his application, that he had never had spitting of blood or consumption, were false. The judgment in the court below, in favor of the plaintiff and against the company, was reversed.

In *Fairchild et al. vs. The Liverpool and London Fire and Life Ins. Co.*, decided in the Commission of Appeals of New York, the question related to the construction of a condition in a floating policy, where there was other and specific insurance upon the same property. The court held that if the language of the policy is free from ambiguity, the intention of the parties must be sought in the language, but if it is ambiguous, then the surrounding circumstances, the situation of the parties, and the objects intended to be accomplished, are all to be considered.

*Smith vs. The Aetna Life Ins. Co.*, was decided in the Court of Appeals of New York. The defense on the part of the company was that the assured had made false representations in the application, in regard to his health. The referee in the Supreme Court, against the evidence in the case, found for the plaintiff. The Court of Appeals affirmed the order of the General Term, setting aside the report of the referee, and granting a new trial, and ordered judgment absolute for the company, Judge Peckham remarking that justice would be promoted if the Supreme Court would more frequently exercise its unquestioned right of reviewing verdicts upon the facts.

In *Fried vs. The Royal Ins. Co.*, the questions at issue related to the power and authority of an insurance agent, and the effect of what is called a binding receipt. The plaintiff applied to the agent of the company for a policy upon the life of her husband, and paid the premium at the time of making the application. It was agreed, at the same time, that if the application was accepted at the head office of the company in Liverpool, a policy should be issued, and that if the husband should die before the decision was received, the amount of the insurance should be paid. The company accepted the application



and forwarded the policy, but the agent, in accordance with his general instructions, refused to deliver it on the ground of an unfavorable change in the health of the assured. The case was decided in the Court of Appeals of New York. The court held that the acceptance of the company was absolute and not modified by the general instructions to the agent, and that the contract took effect from the date of the application, and that if it was accepted, the risk of an unfavorable change of health after that time was assumed by the company. The court also held that the construction to be given to the instructions to the agent must be most unfavorable to the party giving them.

In the case of the *Home Ins. Co. vs. The Western Transportation Co.*, the court held that the burden of proof is upon common carriers to show that damage to goods intrusted to their care resulted from unavoidable accident. A question also arose in the case in regard to a reduction for general average, and a discharge by the agent of the consignees, who assigned the claim to the insurance company. The judgment of the court below in favor of the plaintiff and against the transportation company was sustained. The decision was rendered in the Commission of Appeals of New York.

*The Phoenix Ins. Co. vs. Hamilton et al.*, was decided in the United States Supreme Court in error to the U. S. Circuit Court for the Northern District of Ohio. The court held that the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern, and that the omission of the insured to notify the company of the dissolution of the firm in whose name the insurance was procured, or of the ownership of the property, could not be considered as a concealment, and did not avoid the policy. Mr. Justice Clifford dissented from the opinion of the court.

In *Ogden et al. The East River Ins. Co.*, the Court of Appeals of New York decided that the clause in policies, providing for an apportionment of loss, must receive an independent construction, and that the rules of contribution cannot be engrafted upon it. The defendant issued a policy for \$3,000.00 upon a parcel of property worth \$16,000.00. The policy provided for an apportionment of the loss in case of other insurance. There was other insurance for \$47,000.00 upon this parcel and upon other parcels of property insured together. The value of all the property covered by other insurance was \$88,000.00. All the property covered by the defendants' policy,

and by the other insurance, was destroyed. The court stated the rule applicable to this case, and held that the parcel covered by the defendants' policy was insured by the defendants for  $\frac{3}{4}$  of its value, and that each parcel covered by the other insurance was insured for  $\frac{1}{4}$  of its value, and that as there was no over-insurance, there was no occasion for any apportionment. The learned judge, Rapallo, stated that he refrained from expressing an opinion on the several phases which might arise under an insurance of this character, in case of partial losses, but suggested that the amount of insurance upon any particular parcel might depend upon the extent of the loss, and that whatever could be received upon the more comprehensive policy, without regard to the other, is the amount to be deemed insured thereby on the part injured in case of a partial loss, and that on that basis an over-insurance to the extent of the separate policy might be established.

We publish also the interesting and able opinion of Ch. Justice Beasley, of the Supreme Court of New Jersey, in the case of *Hillyard vs. The Mutual Benefit Life Ins. Co.*, although the court is not the court of highest resort in that State. The decision was rendered upon demurrer. The action arose upon a life policy issued before the late civil war. The assured and his daughters, the beneficiaries and plaintiffs, were citizens and residents of Virginia. The payment of the annual premiums was intermitted during the war, and the assured died during the intermission. The company refused to pay the insurance on the ground that the non-payment of the premiums avoided the policy, and that the insurance was forfeited to the company by the effect of the war, with other technical defences. The learned judge discusses the effect of the war upon contracts and contracting parties, and upon the payment of premiums, in a comprehensive manner, and concludes that a payment of the premiums, at the specified times, became legally impossible on account of the war ; that failure to pay at such times was not a legal breach of the agreement ; that had the premiums been tendered, the company could not, without doing an illegal act, have received them, and that the company will not be permitted to impute a result occurring from their own incapacity, as a breach of agreement on the part of the plaintiffs, and that the tender of the premiums at the close of the war was in legal effect a compliance with the terms of the policy in regard to the payment. The decision of the court was that the company was liable for the amount of the insurance. A part only of the opinion is published in this number ; the remainder will appear next month.



## EDITORIAL ITEMS.

We shall be under especial obligation to attorneys and the officers of insurance companies for copies of printed records and briefs in insurance cases, as we are often unable to obtain them from the clerks of the courts, or from the reporters.

In the report of Reynolds vs. The Commerce Fire Ins. Co., in the *Journal* of last month, the name of the company, in the title of the case, was by mistake given as The *Commercial* Fire Ins. Co.

Our Exchanges, both legal and insurance, will please continue to direct as heretofore, to St. Louis, unless specially notified to the contrary.

## MISCELLANEOUS.

## BURNING OF BARNUM'S MENAGERIE.

Fire Marshal McSpedon, of New York, speaks as follows of the burning of Barnum's Menagerie and Museum:

"After a careful and thorough investigation of the fire at Barnum's Menagerie and Museum on Fourteenth street, which occurred on the morning of the 14th inst., I have arrived at the following conclusions: On the 24th of November last one of my assistants, officer A. D. Mooney, made an examination of the premises and reported to me the condition of the building. He pronounced it to be most dangerous so far as the heating was concerned, and liable to take fire at any moment. He also pointed out these facts to the managers of the museum and menagerie, and they promised to have the dangers remedied as soon as possible. From this report I considered it my duty to give this place

of amusement a careful personal inspection, but a press of business at that moment prevented my carrying out that intention. On the 30th day of the same month I again sent my officer to see if the alterations he had recommended had been made. He made a second examination, and reported the place to me as being in the same condition, and added that the people in charge of the place seemed very indisposed to place any confidence in him, or believe there was any danger of an accident in the building. My officer explained the difference between the ordinary steam passing through heating pipes and what we call superheated steam.

"This superheated steam is the vapor that passes through pipes when the fires have been banked, and the ordinary business of the heating of houses for the day seems finished. It is one of the most dangerous and ignitable elements we know of, and one of the most destructive agents we have to contend against. And notwithstanding the strong expressions of opinion made both by him and myself, Mr. Hurd told him, at his last visit to the museum, that 'when he saw a fire from that cause he would believe it.' I then considered it my duty to report to the underwriters the condition of affairs at the museum. They thereupon visited the premises, and, becoming convinced of the danger which I had pointed out, threatened to cancel their policies unless the necessary improvements I suggested were carried out. These admonitions were entirely neglected, and it will be observed by the testimony of the master builder, Mr. Ball, that even he made some alterations of the steam pipes, by cutting away the wood-work and other combustible material that surrounded these pipes, on the 14th inst. Still these alterations were not adequate, in my estimation, for the preservation of human life and to obviate the dangers of a panic

during the progress of the entertainments. The testimony taken before me on the investigation into the origin of the fire will bear me out most forcibly in the conclusions that I have arrived at. In my opinion as an expert, the fire originated under the floor immediately over the boiler, and from superheated steam, which in its effects is as destructive as burning gas or flame, and where it is allowed to gain strength, is sure to be the cause of terrible results."

#### EXPLOSIONS OF FLOUR MILLS.

An interesting paper, read by Dr. Stevenson Macadam at the meeting of the Royal Scottish Society of Arts, on November 25th, tends to show that flour mills are almost as dangerous neighbors as gunpowder mills, there being nothing under present arrangements, especially of large flour mills, to prevent explosions at any moment. The chemical components of grain are combustible when burnt in the ordinary way, and are consumed with greater rapidity when diffused as a cloud through the air. When flour is showered from a sieve placed above a gas flame, rapid combustion takes place. Indeed, the flour burns with explosive rapidity, and the flame licks up the flour shower somewhat in the same way that it flashes through a mixture of gas and air, or that it treads along a train of gunpowder. When burned, the flour resolves itself into gases. The carbon, by mixing with the oxygen of the air, becomes carbonic oxide or carbonic acid, and the hydrogen and oxygen become water, vapor, or steam. The volume of these gases is much increased by the high temperature at the moment of combustion. The conditions required to bring about a flour explosion are somewhat similar to those which cause a gas explosion. Flour agrees with coal gas in being sim-

ply combustible when unmixed with air, and equally agrees with coal gas in being explosive when mingled with air; but the fine impalpable dust must be diffused through the air in definite proportions, in order to constitute an explosion when a white heat, such as a flame or spark, is brought near. In order to bring about an explosion, it is also necessary that the flour mixture be more or less confined within a given space. The more common way of the production of the spark or flame which fires the flour-air explosive mixture, is the feed going off the stones doing work when the stones set down on each other, and as they are of a flinty or other hard silicious rock, and are revolving at from 100 to 160 revolutions in a minute, they quickly strike fire and become very hot. The feed may go off from want of grain in the hopper, or any obstruction in the feed pipe. A spider's web actually stopped the feed in one case, and led to a violent explosion in an English flour mill. Dr. Macadam suggests various expedients to be adopted for avoiding flour mill explosions, such as the removal of exhaust boxes, stove rooms, smut rooms, and other receptacles of flour dust, to the outside of the mill, and expresses a hope that all proprietors of flour mills will awaken to the necessity of adopting precautionary measures in future, inasmuch as they cannot now plead ignorance of the explosive force of the flour-air mixture.—*Pall Mall Gazette*.

#### LIFE INSURANCE LITIGATION.

The *Monitor*, speaking of two cases that have just been decided in favor of the Mutual Benefit Life Ins. Co., in the U. S. Circuit Court for Massachusetts, makes the following comments, which are eminently sensible and just:

"This company deserves the moral support of the whole fraternity in the



stand it seems to have taken. Several claims have recently been contested, resulting, in every instance where the case has gone to a jury, in a verdict against the company. Not one of these cases was contested that did not exhibit on its face open and flagrant breach of contract. If the officers had simply consulted for the most politic measures, they would doubtless have settled every claim without a protest. They were probably well aware that the advantages to their business would, temporarily at least, have counterbalanced the losses which in nine cases out of ten they would be compelled to pay in the end.

"So far as profit was concerned, the company has had little inducement to dispute a single claim. But the organization is a mutual one. It is compelled, for its own protection, to make its contracts conditional. It owes a duty to those members who have complied in good faith with these conditions, that their interests shall not suffer by treating them as a dead letter—that parties shall not be permitted through fraud to profit by their honesty. The contest is simply one of principle: whether an association of forty thousand members, leagued together for a sacred purpose, are a legitimate prey for swindlers; whether the contracts of such a society are entitled to any legal recognition or not. The company deserves credit for its effort to do justice and to secure justice."

#### THE PRESS AND THE BENCH.

At no period have the relations between that old and venerated institution, the judiciary, and that young and vigorous institution, journalism, attained such an importance, or excited so much anxiety as at the present. Modern civilization possesses no greater intelligent force than that which resides in the press; nor can modern civilization be preserved and perpetuated with-

out the regulating, pacifying, conservative influence of the bench. Two such influences existing in society and in government, and capable of great mutuality and assistance, or of great antagonism and detriment, ought so to be regulated as to produce the greatest co-operation and reciprocity and the least opposition and injury. To regulate and define the precise attitude which the press should sustain to the bench in a republic like ours is no easy task. Regulation and definition, in a scientific sense, are almost impracticable in a free government. On the one hand, we have the liberty of the press sanctioned and authorized in every constitution in the republic; on the other hand, we have the sanctity of courts and the untrammelled administration of justice, provided for by the same fundamental law. So long as journalism assists and encourages the administration of justice, and no conflict arises between the press and the bench, there is no cause for anxiety or dissatisfaction. But when journalism assumes to criticise judicial proceedings, define judicial powers, influence judicial action, the very grave question comes into prominence as to the extent to which journalistic criticism upon judicial proceedings may be allowed. The liberty of the press and the utterance of individual or editorial sentiments, are as inviolable as the sanctity of courts and the judicial action of judges. In America no institution so thoroughly reflects the sentiment of the masses, represents the popular mind, embodies the idea of freedom, as the press. The American free press is pre-eminently a republican institution; and like all great social and political forces, of rapid growth and powerful development, like all great institutions which are the outcome of the age, and which represent the idea and sentiment of the period, the press is naturally intolerant and defiant of restraint and opposition

and relies upon its humanitarian and popular foundations for its strength and support. It has boundless faith in its resources, performance, power and triumph. It represents the spirit of popular ascendancy, of change, of impulse, and of everything which is denominated *reform*. Somewhat opposed to this element in society and the State is the bench, which represents the systematic thought, logic, learning, stability and venerability of a nation; just as the legislature represents temporary needs, the pressing desires, the corrective and reformative intuitions of the people; and just as the executive represents the efficient force and the discretion of the State. Hitherto few cases of journalistic antagonism to the judiciary have developed themselves here. The press has largely contented itself with its peculiar province of furnishing news and collating and arranging valuable information. The party press has, of course, been occupied in the propagation of the particular views and interests of its leaders. And the editorial columns of the independent press have been devoted to the fair criticism of political and governmental matters, and the fostering of a scientific, artistic and philanthropic spirit among the people. But there is an occasional civil or criminal matter, properly belonging to the courts, but, at the same time, by its public and popular bearings, belonging also to journalistic criticism, from which the emergency of the antagonism of the press and the bench arises. The decision of the court being contrary to the public wishes or expectations, the popular clamor is voiced in the public press, and innuendoes, charges, and vilifications are heaped upon the head of the judiciary, the members of which are, probably, more entitled to veneration than any other class. The judicial power of the State can only be administered through individuals; justice can only be admin-

istered through judges, and when courts are assailed by the press, and their action dictated or practically impeded by the press, the remarkable condition occurs wherein the people assail the law and its administrators—justice and the judges. The semi-political trials, and the noted criminal trials of the past decade, are instances of this anomalous condition of public criticism. Courts of impeachment are told what they are expected to do; criminal courts are informed that they must convict and hang; civil courts are told that if a certain remarkable clause is decided in a certain manner, justice is a mockery and money makes law. It is evident that when such things occur it is time that the judiciary was protected and journalism restrained, and that the relations between the bench and the press were better defined. While it is well known among the profession that an ordinary newspaper editorial upon a legal question, or upon a judicial proceeding, is about as reliable and sensible as the criticism of a country singing-master upon the vocalization of a Wachtel or a Lucca, or the remarks of an organ-grinder on the performances of a Rubinstein or a Liszt, or the rough opinion of a sign-painter on the works of a Raphael, yet there is a legitimate department of journalistic criticism in reference to the judiciary. If a judge is known to have received a bribe, positively, no journal would be molested for publishing the fact, with its opinion of the effect it ought to have on his continuance in office. This is a public and political matter, about which the profession and the laity will agree. If a judge is known to be incompetent, positively, no journal should be prohibited from publishing that fact, and commenting on the circumstance that such a man is in a judicial position. If a case has been decided according to principles which are deemed to be wrong and un-



founded in law, no journal would be hindered from fairly going over the reasoning of the court, pointing out its defects, and showing how it would have been better decided. But the great complaint which the legal profession and all thoughtful citizens make against the press is that, in its swelling pride and boasted majesty, it affects to dictate judicial conclusions and influence judicial decisions. And not only this, the press by its ignorance of such matters, (which are exceedingly technical,) and by its lack of discrimination, attacks the bench as being responsible for orders and judgments which they are bound by the law to make, which are directed by the very codes and regulations which the people and the press have helped to make for the guidance of their judges. If, in a specific case of great public interest, the common law fails to do what the popular idea of justice demands, or if the statutes are defective, either as to substantive law or modes of procedure, so that the popular demand cannot be gratified, the great, pompous press comes forth and lays the whole blame at the door of the judge or the court who decides the case. No professional mind can observe the senseless ranting of some newspapers about judicial proceedings without vexation and even indignation. Such a press, always fickle, would make justice as fickle as itself, and the law as changing as the kaleidoscope of popular passion. And when to the simple expression of opinion is added arrogance and menace, in regard to the results of judicial decisions, then no court can fail to exert its latent power and vindicate that majesty and sanctity to which all else, even the press, is subordinate. Whatever may be the place of the press in the social and political economy of our time and country, like all other institutions it has its sphere, and when it intrudes upon the department of legislation, or of the executive,

or of the judiciary, it must become amenable to punishment in such a manner as the department assailed has the power to use in vindicating itself. The mode which the judiciary always adopts in such cases is by proceeding against the guilty parties as for contempt of court, and this is the only protection which the courts have from journalistic insolence and abuse, the only protection save the cultivation of a better, grander and higher spirit in the press and its leaders.—*Albany Law Journal*.

#### LOSSES ON THE MISSISSIPPI RIVER IN 1872.

The following statement of the losses upon the Mississippi River during the year 1872, with the amount of insurance, is from the *Missouri Republican*:

No. of Vessels.	How destroyed.	Value of Vessels.	Insurance.
17	By fire.....	\$354,000	\$135,750
24	By snags .....	510,000	185,000
15	By ice.....	350,000	220,000
4	By collision.....	40,000	10,000
3	By explosion.....	56,000	30,000
8	By striking piers and dams.....	100,000	20,000
—		<hr/>	<hr/>
71		\$1,410,000	\$600,750

"The total aggregate loss on both boats and cargoes on western rivers during the past year will not fall much below \$4,500,000. In this large estimate we, of course, include all the minor casualties, and estimate the loss from damage and delay to cargoes not totally destroyed. A noticeable feature exhibited by these figures is the comparatively small amount of property lost from causes chargeable to the steamboatmen. In this class of accidents we place collisions, clearly so, and explosions, partly chargeable to want of precaution on the part of steamboatmen. The immense loss occasioned by natural and artificial obstructions to navigation is significant."

# NUMBER OF INSURANCE COMPANIES IN NEW YORK.

General Dix, in his inaugural message, stated that the number of insurance companies subject to the supervision of the insurance department, on the first day of December, 1872, was as follows :

New York joint-stock fire insurance companies .....	93
New York mutual fire .....	7
New York marine .....	9
New York life .....	32
Fire insurance companies of other States...	78
Marine insurance companies of other States...	1
Life insurance companies of other States....	28
Casualty insurance companies of other States	3
Foreign insurance companies.....	13
Total.....	264

## LAKE DISASTERS IN 1872.

The following is from an article in the *Monitor*.—The *Milwaukee Wisconsin* occupies nearly seven columns with a record of disasters on the great lakes and on the river St. Lawrence, during the year 1872. It says the list is nearly as large as that of 1869, and the destruction of property but little less than in that year. May, September, October, and November were the most destructive months, the damage in November alone being upward of \$1,000,000. The total number of vessels lost during the year is 745, and the total amount of damage \$2,988,000. The estimated damages is based upon the more serious disasters alone. Add the damage by minor disasters, such as loss of deck loads, canvas, outfit, collisions, etc., and the total amount will be swelled to nearly \$3,250,000. The summer of 1872 was remarkable for light winds and smooth seas, and the autumn equally remarkable for boisterous and tempestuous weather ; so that the promise of immunity from destruction held out early in the season was dispelled by the later storms. The number of vessels totally destroyed by fire and wrecked by storms in 1872 reaches nearly one hundred.

# ITEMS.

The legislature of Vermont has again elected the present justices of the Supreme Court, to wit : Hon. John Pierrepont, Hon. James Barrett, Hon. Asahel Peck, Hon. H. H. Wheeler, Hon. Homer E. Royce, Hon. Jonathan Ross, and Hon. T. P. Redfield.

The Mutual Life Ins. Co., of Chicago, has reinsured the Safety Deposit of that city.

An amendment to increase the number of judges of the Supreme Court of Wisconsin from three to five, was recently submitted to a vote of the people of that State, and voted down by a large majority.

The United States Senate has confirmed the nomination of Alexander Knowles as Justice of the Supreme Court of Montana Territory.

Hon. William Wirt Virgin, State reporter of Maine, has been appointed judge of the Supreme Court of that State, in place of Judge Tapley, whose term of office has expired.

Gov. Dix has appointed the Hon. Alexander S. Johnson, of Utica, as Commissioner of Appeals, in place of Hon. Ward Hunt, and the appointment has been confirmed by the Senate.

It is recorded that Lord Bacon rewrote one of his works twelve times before it was satisfactory to himself. If some of our present-day law writers would follow Bacon's example, they would come nearer discharging "their debt to the profession" than they are now wont to do.—*Albany Law Journal*.



## CURRENT TOPICS.

—The attorney for the appellee in the *Mutual Benefit Life Ins. Co. vs. Miller*, thus discourses, in his brief, concerning insurance companies: "The citizens of Indiana have suffered much by the prostitution of legal forms and rules, to the chicanery of insurance companies. It is refreshing to see the 'cheek' with which those companies appeal to what they call equity, from a legal decision, when the demon of technicality, which has served them, proves once faithless. Instead of remodelling 'justice,' these companies had better remodel their policies. If this forum were the proper one in which to discuss changes of the law, we would recommend the enactment of a statute which would estop insurance companies from setting up to an action any defense which accrued before the delivery of the policy."

—An exchange says: "The very saddest cases of utter destitution are those women suddenly left by their husbands' death without a penny in the world, and absolutely dependent on their lonely and exhausting toil. The husband, perhaps, has been laid up for two or three months beforehand; a little store of savings has been exhausted, owing to the husband's loss of work and the expenses of his illness; they have fallen back with the rent, and when the last duty of watching is done, and all is over, the poor widow has to turn and face a prospect of absolute destitution. It is impossible to avoid reflecting, when one witnesses such a case, what an inestimable boon it would be to such a widow if her husband had been able to insure her a moderate annuity or sum which would enable her to apprentice her children, and give them a fair start in life.

—The sensation of the closing week of the year was the arrest of Stephen English, the editor of the *Insurance Times*, on the charge of libel, preferred by Geo. T. Hope, president of the Continental Fire Ins. Co. The arrest took place on Monday, at 2 o'clock, and bail was fixed at \$10,000. Mr. English was kept in custody of the sheriff until noon of Tuesday, when he was released, Pliny Freeman, of the "Globe Life," and Charles Stanton, of the "Knickerbocker Life," appearing as his bondsmen. Of Mr. Hope's procedure we have only to say that it was absurd to the last degree. If the insurance companies are bent on making Stephen a martyr, there is no better way of doing it than that chosen by Mr. Hope. The higher indictments are heaped upon Mr. English, the more of a power is the *Insurance Times*. Insurance journals are coming bravely to the front. The public has in a recent conspicuous case been made to hear and heed them; and now the president of a leading fire insurance company stoops to exalt an insurance editor to the lofty pinnacle of sacrifice sacred to the Woodhull, the Clafin, and the Geo. Francis Train.—*Chronicle*.

—About seventy of the most distinguished members of the bar of the United States Supreme Court have addressed a letter to ex-Justice Nelson, expressing their high appreciation of his learning and integrity as a judge, and expressing their regret at his resignation.

—The following handsome and well deserved compliment to Isaac Grant Thompson, Esq., editor of the *Albany Law Journal*, by Chief Justice Church, of the New York Court of Appeals, will be appreciated by the readers of that journal:

"My Dear Sir: I am authorized by all the members of the court to express

to you our unqualified approval of the *Albany Law Journal*, edited by you. We regard it a very valuable publication, which cannot fail to be favorably appreciated by the profession generally. It would be difficult, I think, to suggest any improvement.

Very truly yours,  
S. E. CHURCH.

—Luther W. Frost, Esq., has been elected president of the Continental Life Ins. Co., in place of Justus Lawrence, deceased.

—William Aldrich has been appointed treasurer of the Mutual Life of Chicago.

—The Triumph Insurance Company of Cincinnati has reinsured the risk of the Amazon.

—At the annual meeting of the Chicago board of fire underwriters, held on the 3rd ult., Mr. Geo. C. Clarke was re-elected president, Mr. Chas. H. Case was elected vice-president, and Mr. Alfred Wright was re-elected secretary.

—Over two hundred and fifty members of the Philadelphia bar joined in tendering Chief Justice Thompson a public dinner, upon the occasion of his retiring from the bench of the Supreme Court of Pennsylvania.

—Judge Ingraham, of the New York Supreme Court, has decided that watches come under the head of "necessary articles," which cannot be taken by creditors.

—Chief Justice Nicholson, of the Supreme Court of Tennessee, immediately after the adjournment of the court, January 3rd, fell down a flight of steps at the Capitol and fractured his thigh. This accident will prevent him for some time from resuming his seat on the bench.

—We publish, in this number, the prospectus of the *Western Jurist*. This Journal not only has a high reputation in the Northwest, but is one of the most valuable legal journals in the country. With the January number it enters upon its seventh volume.

—The *Insurance Monitor* with its January number entered upon its twenty-first year. In age the *Monitor* stands first, and in character and influence is second to no insurance journal in the country.

—The cases against Mr. Charles F. Mills, which originated with the Mutual Life Ins. Co. of New York, more than a year since, on a charge of embezzlement, have been dismissed for want of prosecution. The many friends of Mr. Mills will be gratified by this vindication of his innocence of the charges made against him.

—A bill passed both houses of the Michigan legislature on the 11th ult., increasing the salaries of the judges of the Supreme Court of that State, from \$2,500 to \$4,000. This is a step in the right direction.

—A New York statute allows deductions of a certain number of days to be made, on account of good behavior, from the term of imprisonment of convicts, further providing that the act shall not apply to any person sentenced for the term of his natural life.

—A householder in Florida, in filling up his census schedule, under the heading, "where born," described one of his children as "born in the parlor," and the other "up stairs."

—"Are you guilty, or not guilty?" asked a judge of a prisoner the other day. "An sure, now," said Pat, "what are you put there for but for to find that out?"



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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

*From certified transcripts in our possession.*

APPLICATION.

§ 35. LIFE.—*Answers in, Warranties—Examination of Surgeon—Spitting of Blood.*—The policy provided that if the declaration made by or for the assured, should be found in any respect untrue, the policy should be null and void. It was stipulated in the declaration, made and signed by the assured at the time of his application for insurance, that the answers of himself, his physician and his friend, should be the basis of the contract. In the particulars given of himself in answer to questions asked, the assured stated, among other things, that he had not, since childhood, had spitting of blood or consumption; that he had not had any sickness within the last ten years, except scarlet fever, and that he had not then any disease or disorder. The policy was issued September 3rd, 1869, and the assured died April 2nd, 1870, of disease of the lungs. The evidence showed that, prior to the issuing of the policy, the de-

ceased had had spitting of blood, and that he then had consumption; that he knew he had had spitting of blood and had sufficient reason to believe that he then had consumption. *Held*, that "if the applicant had had spitting of blood prior to the time when he effected insurance on his life, we think he was bound to state the fact in the particulars of himself, given by him in answer to the questions propounded to him, and that the fact that he was examined by a surgeon, employed for the purpose by the company, was no excuse for not having done so. Such questions are designed to induce a full and fair statement of the condition of the party seeking insurance, and, in this case, the answers must be held to be warranties, on the part of the applicant, that the facts were as stated by him. Whether the hemorrhage proceeded from one cause or another, it was material and necessary that the statement, in answer to the question relating to it, should have been true."

Geach vs. Ingall, 14 M. & W., 95.

*The Mutual Benefit Life Ins. Co. vs. Miller.\**

Rep'd Jour'l p. 101.

IND. B. C.

## CONSTRUCTION.

§ 36. FIRE.—*Of Policy—Principles of—Floating Policy.*—The defendant issued to plaintiffs a policy upon merchandise "in all or any of the brick or stone warehouses, and while in transition in or on any of the streets, yards or wharves of the cities of New York, Brooklyn and Jersey City." A condition indorsed on the policy provided that "in case the property aforesaid in all the buildings, places or limits, included in this insurance, shall, at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then this company shall pay and make good to the insured such a proportion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid, at the time when such fire or fires shall first happen. But it is at the same time declared and agreed, that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall, at the time of

\* Decision rendered May 31st, 1872. To appear in 35 Ind.



any fire, be insured in this or any other office, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy, and subject to average as aforesaid. A fire occurred destroying merchandise in one of the warehouses mentioned in the policy, upon which the amount of specific insurance was less than its total value, but more than the amount of the loss. *Held*, that "if the language used by parties be free from ambiguity, their intention must be sought in the language; but if it be ambiguous, then the surrounding circumstances, the situation of the parties, and the objects intended to be accomplished, may all be considered, and the language read in the light which they reflect," and that the effect of the condition in the policy was that if at the time of any fire there should be any specific insurance upon the merchandise, this policy should not cover the same, but should attach to and protect only that portion of the value of the same which was in excess of the specific insurance, and that as the specific insurance in this case exceeded in amount the value of the goods destroyed, the loss did not reach the interest insured by the floating policy, and the defendant was not required by the policy to contribute any portion of the loss.

*Fairchild et al. vs. The Liverpool and London Fire and Life Ins. Co.\**

Rep'd Jour'l p. 112.

N. Y. Com. A.

§ 37. *LIFE.—Instructions to Agent—Practice.*—The company, by their agent, agreed to issue a policy; if the application was accepted at the head office. The application was accepted at the head office, and a policy forwarded to the agent to be executed and delivered. It was executed by the agent, but on the ground of a change in the health of the nominee, was never delivered. The standing instructions to the agent, which were not brought to the notice of the applicant, were that if any change had taken place in the health of the applicant, between the date of the application and the receipt of the policy, he should not deliver the policy. *Held*, that the construction to be given to the instructions to the agent, in view of the language of

\* Decision rendered September Term, 1872. To appear in 46, N. Y.

those instructions, the terms of the contract, the situation of the parties, and the objects to be attained, must be most unfavorable to the party giving the instructions. *Held*, also, that although the company failed to issue the policy according to their contract, they are liable upon the contract, as a contract of insurance, and that they are at all events clearly liable for damages for not delivering the policy.

*Fried vs. The Royal Ins. Co.\**

Rep'd Jour'l p. 120.

N. Y. C. A.

§ 38. FIRE.—“*Other Articles in his Line of Business*”—*Fireworks*.—The defendant insured the plaintiff's stock of fancy goods and other articles in his line of business as a German jobber and importer, charging the ordinary premium and giving him the privilege of keeping fire-crackers on sale in the store. The policy contained a provision that fireworks, which were among goods described as specially hazardous, and upon which an extra amount of premium was charged, should not be covered by the insurance unless specially written in the policy. A loss occurred from a fire which originated in fireworks kept for sale in the store. *Held*, that the fireworks were not included in the clause “other articles in his line of business,” and that the court below did not err in rejecting the plaintiff's offer to prove that fireworks constituted an article in the line of business of a German jobber and importer, and in giving judgment for the defendant.

*Steinbach vs. The Relief Fire Ins. Co.†*

U. S. S. C.

§ 39. MARINE.—*Suing and Laboring Clause—Liability beyond Sum in Policy—General Average*.—The defendant insured a brig belonging to the plaintiff and valued at \$10,000.00, against perils of the sea to the amount of \$8,000.00. The policy provided that “in case of any loss or misfortune it should be lawful and necessary to and for the insured, their factors, servants and assigns, to sue, labor and travel in and about the defense, safeguard

\* Decision rendered November 11th, 1872.

† Decision rendered March 26th, 1872.



and recovery of the said vessel or any part thereof, without prejudice to the insurance made by said policy, and that the said company would contribute to the charges thereof according to the rate and quantity of the sum insured by said policy." The brig was driven ashore on the main reef near Key Chappell, and badly damaged, after which she returned to Balize, where it was found she needed extensive repairs. In taking her back from the reef to Balize, unloading her, taking care of her and her cargo, and ascertaining the nature and extent of the damage sustained, expenses were incurred the proportion of which, applicable to the brig, as specified in a general average statement, was \$581.18. Temporary repairs were made at Balize, amounting to \$8,769.74, and after the return of the brig to New York she was fully repaired at a cost of \$4,547.21. The company paid \$8,000.00, the amount of the insurance. The plaintiffs demanded 8-10 of \$13,898.13, the amount of all the expenses and repairs. *Held*, that the suing and laboring clause in the policy "has reference to charges not covered by the insurance, and does not embrace losses caused by damages to the property insured. Its object was to secure diligence in its preservation and protection, and thereby prevent a loss, or reduce its amount, and to provide compensation for the labor done and expenses incurred in accomplishing that end. It has application in the present case only to the general average expenses that had been incurred." *Held*, also, that "in respect to the item of \$581.18, general average, in getting off the vessel and running her to the Balize, the authorities are clear that it is a proper charge upon the underwriters in addition to their subscription, although there was but a single loss."

*Jumel vs. The Marine Ins. Co.*, 7 J. R., 412; see *McBride vs. the same*, *ib.*, 431.

*Held*, also, that the underwriters are liable over and above the sum insured for four fifths of \$581.18, the vessel's proportion of the general average expenses.

*Alexandre et al. vs. The Sun Mutual Ins. Co.*\*

*Rep'd Jour'l*, p. 209.

N. Y. Com. A.

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\* Decision rendered January Term, 1873.

§ 40. MARINE.—*Liability beyond Sum in Policy.*—A brig belonging to the plaintiffs was insured by the defendant against the perils of the sea, the policy containing a suing and laboring clause. The brig was driven ashore in a gale on the reef near Key Chappell, and badly damaged, after which she returned to Balize, where temporary repairs were made, and thence to New York, where full repairs were made. *Held*, that the insured could not, independently of the suing and laboring clause, recover for the excess of the cost of repairs over and above the amount of the insurance on the ground that the underwriter was liable upon the general principles of the contract of insurance to pay for expenditures incurred to prevent or diminish the extent of the loss.

*Alexandre et al. vs. The Sun Mutual Ins. Co.*

—139.

#### COMMON CARRIERS.

§ 41. MARINE.—*Liability of—Burden of Proof—Receipt of Goods.*—The assignors of the plaintiff shipped from Oswego, on the defendants' canal boat, 5,720 bushels of wheat, to be delivered in good order to the consignees in New York city, the bill of lading stipulating that damage or deficiency in quantity was to be deducted from the charges by the consignees. The voyage was suspended, the latter part of December, at Fort Plain, and the wheat was found to be damaged by water. The defendants gave notice of the facts to the consignees, and they notified the plaintiffs, who had insured the cargo for them. Under the instructions of the defendants, the plaintiff's agent took charge of the cargo "for account of whom it may concern," and by consent of all parties sold the damaged portion of the wheat and stored the remainder, and in the spring the sound wheat was delivered from the storehouse upon order of the defendants and reshipped by them to New York under the terms of the original bill of lading, and delivered to the consignees, who gave a receipt for the amount shipped, less the amount sold as damaged. *Held*, that "it was not proved how the damage was occasioned, nor that it resulted from any cause that



would excuse the defendants from their liability as common carriers. Hence sufficient appeared to establish the liability of the defendants. If they claimed that the wheat was damaged from inevitable accident, the burden was upon them to show it."

Angell on Carriers, §§ 188, 202, 472; King vs. Shepherd, 3 Story Cir. Ct. R. 349; Hawkes vs. Smith, 1 C. & Marsh. R., 72.

*Held*, also, that there was nothing to indicate that the consignees or the insurance company intended to discharge the defendants for the damage to the wheat when their agent received it at Fort Plain.

*The Home Ins. Co. vs. The Western Transportation Co.\**

Rep'd Jour'l p. 124.

N. Y. COM. A.

§ 42. MARINE.—*Finding of Referee—Practice*.—The assignors of plaintiff shipped a lot of wheat on defendant's canal boat, which was found, while in course of transportation, to have been damaged by water. The damaged portion was sold and the remainder reshipped and delivered to the consignees, who gave a receipt for the amount shipped, less the amount sold as damaged. At the same time there was a settlement between the consignees and the defendants, in which the defendants allowed for some bushels of wheat short, and \$50.00 "for general average." The loss of the consignees after allowing for salvage was \$1,846.75. The defendants claimed the \$50.00 was paid in satisfaction of the entire damage to the wheat. *Held*, that the \$50.00 was not in satisfaction of the full amount of the loss, but was probably taken by mistake from the carriers instead of from the insured, in accordance with a provision in the policy, that in case of loss the insured should pay the whole amount of loss, deducting \$50.00 instead of average, and that the finding of the referee that the entire damage to the wheat was not included in the settlement, is conclusive. *Held*, also, that the judgment against the defendants is probably too much by \$50.00, but that it cannot be rectified here, as the amount was not claimed in the court below, and no exception was taken in regard to it.

*The Home Ins. Co. vs. The Western Transportation Co.*

§ 42.

\* Decision rendered September Term, 1872.

## INSURABLE INTEREST.

§ 43. FIRE.—*Nominal Partners—Goods on Consignment.*—Insurance was effected with the plaintiffs in error, in the name of the firm of Hamilton & Cook, grain commission merchants, against loss or damage by fire on "grain, in store, their own, or held by them in trust or on commission, or sold and not delivered." Prior to effecting the insurance, Hamilton, one of the members of the firm, had retired, and Cook, by mutual agreement, was allowed to carry on business in the partnership name, no notice of the dissolution being given. The firm kept their consignments of grain in store in an elevator belonging to a railroad company, whose employees had the entire charge and care of it. *Held*, that "the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in absence of any attempt to defraud, to join with the other members of the firm, in effecting insurance on the property of the concern," and *Held*, that "in this case the intimate connection of Hamilton with the business, and the fact that as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attaching to that relation, constituted, in our judgment, a sufficient basis of interest for effecting insurance in the name of the firm," and that this case is an especially strong one, from the fact that the insurance was effected mainly for the benefit of the owners of the grain, held on commission, and that the action was prosecuted solely for their benefit.

*The Phoenix Ins. Co. vs. Hamilton, et al.\**

Rep'd Jour'l p. 130.

U. S. S. C.

## LOSS.

§ 44. FIRE.—*Apportionment of.*—The defendant issued a policy for \$3,000.00 upon a parcel of property worth \$16,000.00.

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\* Decision rendered November 18th, 1872.



The policy contained the usual clause providing for an apportionment of the loss, in case of other insurance. There was other insurance for \$47,000.00, upon this parcel and other parcels of property insured together. The value of all the property covered by the other insurance was \$88,000.00. All the property covered by the defendants' policy and by the other insurance was destroyed. *Held*, that "the clause, now usual in policies of insurance, which provides for an apportionment of the loss, in case of other insurance on the property, is a part of the contract, and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, or to restrict its operations to cases where such suits could be maintained." *Held*, also, that the rule of apportionment, where the entire property is destroyed, is that "for the purpose of apportioning the loss, in case of over insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by the policy bears to the total value of all the parcels."

<sup>2</sup> Phillips on Ins., p. 56, No. 1,263 a; Blake vs. Exchange Mutual Ins. Co., 12 Gray, 265.

*Held*, also, that in case of a total loss, the parcel covered by the defendant's policy was insured by the defendant for  $\frac{3}{16}$  of its value, and each parcel covered by the other insurance was insured for  $\frac{17}{32}$  of its value, and that in this case there was no over insurance, and, consequently, there is no occasion for any apportionment.

*Ogden vs. The East River Ins. Co.\**

Rep'd Jour'l p. 134.

N. Y. C. A.

## OWNERSHIP.

§ 45. FIRE.—*Of Goods on Consignment—Nominal Partners*  
—Insurance was effected with the company in the name of the

\* Decision rendered December 3rd, 1872.

firm of Hamilton & Cook, grain commission merchants, against loss or damage by fire on "grain, in store, their own, or held by them in trust or on commission, or sold and not delivered." Prior to effecting the insurance, Hamilton, one of the members of the firm, had retired, and Cook, by mutual agreement, was allowed to carry on business in the partnership name. No notice of the dissolution was given. The firm kept their consignments of grain in store, in an elevator belonging to a railroad company, whose employees had the entire charge and care of it. *Held*, that "policies are constantly applied for and granted on general stocks of goods, held in trust or on consignment, for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that insurers should be informed as to the ownership. They are content to insure for whom it may concern. Of course an omission to disclose ownership in such cases cannot be regarded as an improper concealment." *Held*, also, that there was no error in the charge of the court below, that "if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy; and that if Hamilton & Cook had no actual care or custody of the grain, but that, so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood by the defendants' agent, when the policy was effected, the omission to notify the defendants of the agreement of dissolution could not be considered as a concealment which would avoid the policy."

*The Phoenix Ins. Co. vs. Hamilton, et al.*

—143.

#### POLICY.

§ 46. LIFE.—*Delivery of—Acceptance of Application—Instructions to Agent—Change of Health.*—The contract contained a proposition, on the part of the plaintiff, for insurance on the life of her husband, for which she advanced the usual premium for one year. The defendants, by their agent, agreed that if the proposition was accepted at their head office in Liverpool, they



would issue a policy in accordance therewith, but if rejected, that they would return the premium; and that if the nominee should die before the decision of the head office was received, the amount of the insurance should be paid. The defendants accepted the proposition, and forwarded a policy to their agent, to be executed and delivered. It was executed by the agent, but, on the ground of an unfavorable change in the health of the nominee, was never delivered. The standing instructions of the company to the agent were that if it should come to his knowledge that any change had taken place in the health of the assured, between the date of the proposal and the receipt of the policy, he should not deliver it until he had communicated with the company. These instructions were not brought to the notice of the plaintiff. *Held*, that the acceptance, by the defendants, of the proposition contained in the contract made by their agent, is conclusive of their assent to his authority to make the precise contract he did make, and that the acceptance of the company was absolute, and not qualified by the general instructions to the agent. Such instructions could not alter or qualify the terms of the contract, to the prejudice of the plaintiff. "It is a familiar principle that private instructions to an agent will not affect third persons."

23 Wend. 18: [Lightbody vs. North American Ins. Co.] Story on Agency, § 133.

*Held*, also, that "the contract of insurance was to take effect from the date of the proposal. If accepted, the risk of an unfavorable change of health, after that time, was necessarily assumed by the company."

*Fried vs. The Royal Ins. Co.*

—§ 37.

#### PRACTICE.

§ 47. LIFE.—*Instructions to Jury in Writing.*—The counsel for the plaintiff, on the trial, in accordance with the statute, openly requested the judge to give his instructions to the jury in writing, and afterwards, when it was too late for the defend-

ant to make such a demand on her own behalf, withdrew his request. *Held*, that this was no cause for reversal of the judgment for the plaintiff.

*The Mutual Benefit Life Ins. Co. vs. Miller.*

—435.

#### SUING AND LABORING CLAUSE.

§ 48. MARINE.—*Abandonment*.—A brig belonging to the plaintiffs was insured by the defendant against the perils of the sea. The policy provided that “in case of any loss or misfortune it should be lawful and necessary to and for the insured, their factors, servants and assigns, to sue, labor and travel in and about the defence, safeguard and recovery of the said vessel, or any part thereof, without prejudice to the insurance made by said policy, and the said company would contribute to the charges thereof according to the rate and quality of the sum insured by said policy.” The brig was driven ashore in a gale on the reef near Key Chappell and badly damaged, after which she returned to Balize, where temporary repairs were made, and thence to New York, where she was fully repaired. *Held*, that the rights of the insured under the suing and laboring clause were not prejudiced by the non-existence of an abandonment.

*Kidstone vs. The Empire Marine Ins. Co.*, Law Rep.—1 Com. Pleas, 531, and 2 Law Rep.—Com. Pleas, 357.

*Alexandre et al. vs. The Sun Mutual Ins. Co.*

—436.

§ 49. MARINE.—*Construction—Safeguard*.—The defendant insured a brig belonging to the plaintiffs against the perils of the sea. The policy provided that “in case of any loss or misfortune, it should be lawful and necessary to and for the insured, their factors, servants and assigns, to sue, labor and travel in and about the defense, safeguard and recovery of the said vessel, or any part thereof, without prejudice to the insurance made by said policy, and that the said company would contribute to the charges thereof according to the rate and quantity of the sum insured by said policy.” The brig was driven ashore in a gale on the main reef near Key Chappell and badly damaged, after

which she returned to Balize, where it was found that she needed extensive repairs. Temporary repairs were there made, after which she sailed to New York, where she was fully repaired. *Held*, that the expenditures for repairs "were made to repair damages covered by the risks insured against, and were clearly payable under the insuring clause. They consequently do not come within the terms or meaning of the agreement to 'sue, labor and travel,' for the benefit of the property insured." *Held*, also, that the repairs at Balize were not about the defense, safeguard, or recovery of the vessel, but for her improvement, and that "expenses for the safeguard of a ship cannot properly be said to be those by which she is put in a condition of sea-worthiness."

*Alexandre et al. vs. The Sun Mutual Ins. Co.*

—§ 39.

#### WARRANTY.

##### § 50. LIFE.—*And Representation—Policy and Application.*—

It was provided in the policy that if the declaration, made by or for the assured, of even date with the policy, should be found in any respect untrue, the policy should be null and void. It was stipulated in the declaration, made and signed by the assured at the time of his application for insurance, that the answers of himself, his physician, and his friends should be the basis of the contract. In the particulars given of himself, in answer to questions asked, the assured stated, among other things, that he had not, since childhood, had spitting of blood or consumption; that he had not had any sickness within the last ten years, except scarlet fever, and that he had not then any disease or disorder. *Held*, that "the policy, the declaration and the particulars of the applicant must be regarded as one instrument. The policy on its face refers to the declaration, and it refers to the particulars. A covenant or agreement, to become a warranty, need not appear on the face of the policy, but may be on a paper referred to in, and made a part of the policy."

*Cox vs. The Aetna Ins. Co.*, 29 Ind. 586, and authorities cited; *Angell on Fire and Life Insurance*, § 141; *Bliss on Life Insurance*, § 57.

*Held*, also, that the "proposal or declaration, when forming part of the policy, has been held to amount to a condition of warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends."

Vose vs. Eagle Life Ins. Co., 6 Cushing, 42.

Also *Held*, that "a warranty may be of the existence or non-existence of some fact, when it is in the nature of a precedent condition; or it may be promissory, as where the insured undertakes to perform or abstain from some act in the future, when it is in the nature of a condition subsequent. A representation differs from a warranty, for, while the latter must be true, the former need only be substantially true—true so far as the representation was material to the risk. A fact is to be deemed material if a knowledge of it would have induced the insurer to have refused the risk or to have charged a higher rate of premium for taking it."

*The Mutual Benefit Life Ins. Co. vs. Miller.*

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## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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### SUPREME COURT OF NEW JERSEY.

FEBRUARY TERM, 1872.

HENRIETTA HILLYARD, *et al.*,

vs.

THE MUTUAL BENEFIT INS. CO.\*

[Continued from February Number, page 144.]

Judge Washington, in a case in which it was held that an embargo temporarily preventing the performance of a contract, did not destroy its obligations, recognized the principle to which I refer. He says, "Where the rule applies, that if the law forbids the performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo, for example, the ship-owner is disabled from commencing his voyage at the specified time ; but he is bound to go when the prohibition is removed. A strict performance is prevented by the law, and the law excuses it. *Odlin vs. Insurance Co.*, 2 Wash., C. C. R., 317.

There can be no question but that it is, in some degree, a hardship on these defendants to have their responsibility kept alive during the time the benefits of the contract were not fully enjoyed by them ; but it is to be remembered that whenever the law interferes and ties up a party from performance, some hardship is the inevitable result.

Postponement of performance on the one side will generally be in-

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\* Decision rendered June 13th, 1872.

jurious to the other. Such results cannot be avoided. They are **not** uncommon. It has been repeatedly decided that when the payment of a debt is suspended during a war, the interest of the debt is lost to the creditor. Such losses are within the scope of the contracts with which they are connected, construing them by their express terms and their legal implications. In fine, I think the tender of these premiums was, in legal effect, a compliance with the plaintiff's stipulation in that respect.

But there is also a narrower ground upon the first point, which will preclude the objection resting on the alleged default of the plaintiffs. It is this: The declaration shows that the defendants, by the interdict of their own government, were disqualified, during the period in question, from receiving the several premiums remaining unpaid. Under such circumstances it would be strange if the defendants could set up that the plaintiffs have lost all their right under this policy because they omitted to do an act which would have been confessedly nugatory—that is, to tender these moneys, which, of necessity, must have been rejected by the defendants.

I do not know of anything analogous to such a pretension having a place among legal principles. The defendants cannot be permitted to impute a result occurring from their own incapacity as a breach of agreement on the part of the plaintiffs.

The second exception taken at the argument to this action was, that this contract of insurance was a *continuing contract*, and was, on this account, *ipso facto*, avoided by the occurrence of the war.

This contract, clearly, could not have been originated during the prevalence of hostilities. To insure the life or the property of an enemy, while war was being waged, would be an illegal act. Such a contract involves an act of intercourse, and in a state of war, as has been already remarked, all intercourse of a commercial or amicable nature is prohibited. But the contract in question was made while peace prevailed, and was, consequently, lawful in its inception; and as the payment of the premiums was suspended, its continuance was not dependent on the doing of any act on the part of the company or of the assured. It has been repeatedly said that a continuing contract is dissolved by a condition of hostility, but I have not anywhere found that a contract which has been partly performed, and which will remain in force from its own intrinsic quality, without the doing of anything by any party to it, is thus destroyed. Nor can I conceive why a continuing contract, in part executed, should be annulled from this cause, except on the ground that it calls for some



kind of intercourse which is inconsistent with the duty of citizenship. The question has not as yet received any decision which is to be regarded as entirely authoritative. It is still open, and is to be settled by a reference to general consideration, and by the application of analogous principle.

Whether a State has a right, according to the established rules of modern national law, to confiscate the property of an enemy found in its own dominions, is a question about which the most eminent of the writers on public law are not agreed. Those among them who construe the rules of war with severity, maintain the existence of such a right, but the number and weight of authority is opposed to such view. But in this country the question is at rest, for there are several adjudications of the Supreme Court of the United States in favor of the more rigorous rule.

But whilst this harsh doctrine has thus been established, it is attended with this qualification, that to effect such confiscation an act of Congress is requisite, the result is that an enemy's property found in this country on the breaking out of hostilities, is, in the absence of all action of the National Legislature, not liable to forfeiture. Debts due from a citizen to an enemy stand on the same ground; they can be seized at the legislative pleasure, but are not confiscated by mere legislation. "We may therefore lay it down," says Chancellor Kent, "as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the Legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy; but as it is asserted by the same authority, this right is contrary to universal practice, and it may therefore well be considered as a naked and impolitic right condemned by the enlightened conscience and judgment of modern times."

A just appreciation of the principle, and a proper application of it seems to me to lead very plainly to a result adverse to the position taken by the counsel of the defendants. If tangible property and debts are not confiscated, by a condition of war, for the benefit of the public, how can it be plausibly urged that a vested right, such as arises out of the present policy, is to be forfeited by the operation of the same cause, for the benefit of one of the contracting parties?

To properly understand the exorbitance of such a claim we have but to consider the character of the right thus sought to be seized. An insurance company agree to pay a stated sum of money on an event that is certain to happen. In consideration of this promise, an-

nual payments are made, which, in the progress of time, often exceed the sum for which the life is insured. Each day as it passes adds to the value of the interest which the assured has in this policy. When the life insured is nearly spent, the value of such interest approaches its maximum, and there is not much less than the interest which a man has in a debt just falling due. To illustrate this : a life of thirty years standing is insured for fifty thousand dollars ; premiums are annually paid, and at the age of eighty or ninety, no one will doubt that the assured has an interest in the fifty thousand dollars which falls little short of a present ownership. And it is such an interest as this which it is claimed a state of war, *proprio vigore*, vests indefeasibly in the insurance company. It is admitted that if the life had fallen in or before the war, and the liability of the company had thus become fixed as a debt, the effect of the war would have been merely to suspend the payment of such debt. A discrimination between a vested interest of this kind which is maturing, and a debt growing due, is altogether too artificial and imaginary to be legal. The rights of the assured should not be thus sacrificed, nor should an insurance company be allowed to seize to itself this property unless it can be shown that such consequence is inexorably demanded from motives of public policy. Reflection upon the subject has satisfied me that a continuance, during the progress of a war, of insurance on the life of an enemy is not inconsistent with the welfare of either of the belligerents. What effect can the existence of such a contract have upon the public interests of the one or of the other ?

If money for a past consideration fall due after a declaration of hostilities, the debt is not cancelled, but the payment of it is suspended until peace is proclaimed. The reason why the debt is allowed to be preserved is, that the existence of such debt does not work any injury to the government of the debtor ; and the reason why the payment is suspended is, that the receipt of the money would be a direct contribution to the pecuniary resources, for hostile uses, of the government of the creditor.

And so clearly has this principle been acted upon, that it has on many occasions been decided that the payment of a debt due to an enemy is allowable if made to an agent of the creditor residing under the dominion of the government of the debtor ; the money in such case not being withdrawn beyond the control of the latter government, for it would be clearly illegal for the agent receiving such payment to transmit the funds to his principal until the restoration of peace. It is incontestably plain, therefore, that the state of debtor



and creditor, resulting from transactions anterior to the war, is not interdicted by the rules of national law ; and as the continuance of the efficacy of a life policy can have no greater effect than to produce a state of debtor and creditor, how can such continuance be pronounced illegitimate?

It was urged on the argument that the policy, if held valid, might be enforced even though the life insured was lost in the war ; but such a deduction is unfounded, for the argument can by no reasonable construction be so tendered.

It has already been shown that the English courts have long since declared that there was an implied condition in every marine policy that the promised indemnification should not be extended to losses occasioned by a capture made by the government of the underwriter. A stipulation that the money should be payable even though the life insured should be lost in a war which might arise between the States of the assured and the insurer would be clearly illegal and void ; and the consequence is that no such provision, which if present would vitiate the whole agreement, can be understood to be comprehended in the general expressions which are in common use in these policies. An exception is invariably implied embracing every case of a loss of life by any means concerning which it would be criminal or incompatible with the law, or against the public interest to stipulate or bargain.

I cannot see that there is anything in either of the grounds thus taken which should be permitted to defeat this action.

The adjudications heretofore made on this subject, although the precise point of the present case does not appear to have been present in any of them, exhibit a decided tendency to reject the doctrine that a policy of life insurance is avoided by a state of war, or by the non-payment of premium during its continuance. The *Manhattan Life Ins. Co. vs. Warwick*, 20 Gratt. 614 ;\* *Robinson vs. International L. A. Co.*, 42 N. Y., 54 ; *The New York L. Ins. Co. vs. Clifton*, 7 Bush, 179.

With respect to the formal exception that this action has not been brought in the name of the party to whom the promise was made, I do not think it should prevail. The general rule is that the suit may be brought in these policies when in the form of simple contracts, in the name of the party having the beneficial interest. It is true that the agent who effected the insurance is styled in it a trustee, but that does not make him such, as his powers and capacities appear to be

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\* 1 *Ins. Law Jour'l*, 115.

those simply of an agent. The declaration would have been more consistent with correct theory, if it had laid the promise, according to the legal inference, to have been made to the plaintiffs; but there is a defect of form which is cured by our statute; at least when the exception is raised on demurrer.

It was likewise urged that by virtue of the incorporation of the defendants, the plaintiffs as holders of a policy became partners with the other corporators, and that the war dissolved such partnership. It does not seem to me that a state of war would, by reason already given on another branch of the case, dissolve a partnership of this character; nor does it appear how such a dissolution, even if it took place, would affect the obligations of the policy; but it is enough at present to say, that the pleading demurred to does not dissolve the existence of such a relationship, and that consequently the point is not now raised.

The plaintiffs are entitled to payment.

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## SUPREME COURT OF INDIANA.

NOVEMBER TERM, 1872.

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*Appeal from the Franklin Circuit Court.*

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THE FRANKLIN LIFE INS. CO., <i>Appellant,</i>	}
vs.	
WILBUR F. HAZZARD, <i>Appellee.*</i>	

The company issued a policy upon the life of the assured, who paid the first annual premium and afterwards for the sum of \$20.00 sold and assigned the policy to the appellee, who was not his creditor, and who had no insurable interest in his life. The assignment was assented to by the secretary of the company, subject to the conditions of the policy. The appellee paid the second annual premium, and the assured died after the payment of the premium.

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\* Decision rendered January 14th, 1873.



A policy upon the life of another, issued to a person having no insurable interest in that life is at common law absolutely void, as contrary to public policy.

The New York doctrine that if the policy is valid in its inception, it may be assigned to any one, whether he have any interest in the life of the assured or not—overruled.

The opinion in *Stevens vs. Warren*, 101 Mass., 564, that an assignment of a policy of life assurance to one having no interest in the life of the assured, where the assignment is a cover for a speculating risk, is void, as contrary to the general policy of the law respecting insurance.

The purchase of the policy by the appellee was essentially a wager upon the life of the assured. The law will not uphold such purchases. The appellee acquired no right to the policy or to the sum secured thereby.

U. J. HAMMOND AND J. M. JUDAH, *for Appellant*,  
WILSON MORROW AND NELSON TRUSLER, *for Appellee*.

WORDEN, J.

This was an action by the appellee against the appellant on a life insurance policy issued by the appellant to one William S. Cone, and by Cone assigned to the appellee.

Issue, trial, finding and judgment for the plaintiff below, a motion for a new trial having been made by the defendant and overruled, and exception having been duly taken.

The policy was issued September 2nd, 1867, and stipulated for the payment of the sum of \$3,000.00 by the company to the assured, his executors, administrators, and assigns, within ninety days after due notice and proof of interest, and of the death of said Cone, deducting therefrom all indebtedness of the party to the company.

The premium paid down was \$62.40, and a like premium was to be paid by the assured annually on the 2nd of September during the life of Cone. By the terms of the policy, if the first premium to become due after the issuing thereof should not be paid at the time specified the policy was to be forfeited, and the policy was not to be assigned without the consent of the company.

The material facts on which we place the decision of the cause are these: On the 2nd of September, 1868, the premium then falling due was not paid. Cone afterwards said to the agent of the company that he had concluded not to keep up the policy, and he declined to pay the premium.

Finally he sold the policy to the appellee, Hazzard, and on the 17th of September, 1868, duly assigned the same to him, and the assignment was assented to by the secretary of the company, subject to the conditions of the policy. Hazzard was not the creditor of Cone, nor had he otherwise any insurable interest in his life, but he simply pur-

chased the policy, and paid therefor the sum of twenty dollars. On the policy being assigned to Hazzard, he arranged with the company for the premium due on the 2nd of September, 1868, by paying a part thereof in money, and giving a note for the residue, which, we infer, was afterwards paid. Cone died in July, 1869.

Can the appellee on these facts maintain the action?

We place no stress on the fact that the premium was not paid at the time it fell due, because the forfeiture of the policy seems to have been waived by the subsequent receipt, by the agents of the company, of the premium.

But the question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest. This question is one of first impression in Indiana, and the authorities elsewhere are somewhat in conflict upon the point. We therefore feel at liberty to decide it in conformity with what seem to us to be the general principles of law applicable to the question. There can be no doubt that a policy issued to Hazzard upon the life of Cone, the former having, as in this case, no insurable interest in the life of the latter, would be absolutely void. We quote the following passage from the opinion of the court as delivered by Judge Selden in the case of *Reese vs. Mutual Life Ins. Co.*, 23 N. Y., 516. "Our inquiry therefore is whether at common law, independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life of the insured. A policy obtained by a party who has no interest in the subject of insurance is a mere wager policy. Wagers in general, that is, innocent wagers, are at common law valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these class then does a wagering policy of insurance belong? Aside from authority, the question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against."

There are many authorities establishing that such policies are void as contravening public policy, but it is unnecessary to make further reference to them.

Now, if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable



interest, upon what principle can he purchase such policy from another? If he purchase a policy, as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same "demoralizing system of gaming," and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriter. We are aware that the doctrine is held in New York that if the policy is valid in its inception, it may be assigned to any one whether he have any interest in the life of the assured or not.

*St. John vs. The American Mutual Life Insurance Company*, 13 N. Y., 31. *Valton vs. National Fund Life Assurance Company*, 20 N. Y., 32. Such also seems to have been the view taken by the Vice Chancellor in the case of *Ashley vs. Ashley*, 3 Simons, 149.

But the contrary doctrine is maintained in Massachusetts. *Stevens vs. Warren*, 101 Mass., 564. The following passages from the opinion of the court in the latter case will show the scope and effect of the decision :

"The plaintiff, as administrator of Barton, holds the proceeds of a policy of insurance upon the life of his intestate.

"The fund is assets in his hands for the benefit of one of the defendants as next of kin, after payment of debts, unless the other defendant is entitled to receive it by virtue of an assignment of the policy in the lifetime of the assured. \* \* \* The only question to be determined in regard to the rights of the parties is, whether an assignment of the policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right, in law or in equity, to the proceeds when due. The court are all of opinion that it did not.

"In the first place it is contrary to the express terms of the policy itself, by which it is provided and declared that any such assignment shall be void. In the second place, it is contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life. The general rule recognized by the courts has been that no one can have an insurance upon the life of another unless he has an interest in the continuance of that life. *Dewey K. Warren*, 'the assignee of the policy,' had no such interest, and could not legally have procured insurance upon the life of Barton. We understand the answer to deny that the policy was held by Warren as creditor and for his security, and to assert an absolute right by purchase. The rule of law against

gambling policies would be completely evaded if the court were to give to such transfers the effect of equitable assignments, to be sustained and enforced against the representations of the assured. When the contract between the assured and the insurer is expressed to be 'for the benefit of' another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Sts. c. 58, § 62. \* \* \* The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the assured.

"And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained." The decision in the above case is made to rest quite as much upon the second as the first ground stated, viz.: that an assignment of a policy of life assurance to one having no interest in the life of the assured, when the assignment is a cover for a speculating risk is void, as contrary to the general policy of the law respecting insurance.

After pretty mature consideration we have concluded that the doctrine announced in the case cited from Massachusetts is the true doctrine on the subject.

All the objections that exist against the issuing of a policy to one upon the life of another, in whose life the former has no insurable interest, seem to us to exist against his holding such policy by mere purchase and assignment from another. In either case the holder of such policy is interested in the death, rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life. In our opinion no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another.

In either case he is subject, in the language of Judge Selden above quoted, to "strong temptations to bring about the event insured against."

In this case there was but a simple purchase of the policy by Hazard. He had no interest whatever in the life of the assured. He was a mere speculator upon the probabilities of human life. His



chase was essentially a wager upon the life of Cone, lay in the payment of few or no intermediate annual the early happening of the event which was to entitle 00.00. By his purchase he became interested in the he assured. We are of opinion that the law will not purchases, and that the appellee acquired no right to the sum secured thereby.

e policies are assignable, to be sure, but in our opinion assignable to one who buys them merely as matter of hout interest in the life of the assured. What is such he life of another as will authorize one to insure his a policy upon his life, is a question not involved in e express no opinion upon it.

suggested by the counsel for the appellee that our g for the assignment of contracts embraces contracts on as well as others.

but we do not think the statute contemplates. the t of a contract to a party, who, under the circum- of the general principles of law, is incapable of being he contract

on the plaintiff below was not, on the facts shown, er, and the motion for a new trial should have pre-

below is reversed with costs, and the cause remanded eeding not inconsistent with this opinion.

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## COMMISSION OF APPEALS OF NEW YORK.

JANUARY TERM, 1873.

*Appeal from the Court of Common Pleas of the City and County of  
New York.*

THOMAS JONES, *Appellant*,

vs.

THE FIREMAN'S FUND INS. CO., *Respondent*.\*

The policy issued upon a stock of fireworks, ordnance stores, and other merchandise, hazardous and extra hazardous, provided that if the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein any articles, goods, or merchandise, denominated hazardous, extra hazardous, or specially hazardous, in the second class of hazards annexed to the policy, the policy should be void so long as the same should be so used. The policy also provided that whenever gunpowder or any other article subject to legal restrictions should be kept in quantities greater than allowed by law, or in a manner different from that prescribed by law, the policy should be void.

In the second class of hazards annexed to the policy under the head of hazardous was "Fire-crackers in packages," and under the head of extra hazardous, "Matches—stocks of, on sale." No articles denominated specially hazardous were mentioned in the second class, but in the third class of hazards annexed to the policy were articles denominated specially hazardous, amongst which were "Fireworks."

An ordinance of the Common Council of the city, in force at the time the policy was issued, provided that no person should thereafter "store any fireworks of any kind or description, other than Chinese fire-crackers, within the limits of that city, except as in the ordinance provided." The ordinance further provided that "Fireworks, excepting colored pot and lance wheels, and other works of brilliant-colored fires, not exceeding in value \$1,000.00, might be kept for retailing within the fire limits, from the 10th day of June to the 10th day of July of each year, and no longer except by permission."

About a week before the fire occurred the insured, in order to fill an order from a customer, purchased a quantity of signal lights such as were in the ordinance called "works of brilliant colored fires," and a few remained on hand and were among the insured goods when the fire occurred. The evidence tended to prove that such goods were constantly kept in the store, and that the risk of the

\* Decision rendered January Term, 1873.



ly greatly increased thereby, but that it originated in these sig-

on the 26th day of August, and the property insured was totally

e court below the judge refused to dismiss the plaintiff's com-  
fused to submit to the jury the question whether or not by keep-  
the risk was increased, and directed a verdict for the plaintiff.  
not intended that the insurance should cover an article so spe-  
cimens that the insured had no right to store it.

sense in which the term was used, had reference to such fireworks  
prohibition excepted, or might by permission be kept for retail-

e case the defendant was not entitled to a nonsuit, he was enti-  
e question whether the risk was not increased by keeping the  
icle, submitted to the jury.

an order of the Court of Common Pleas of the city

New York, granting a new trial in an action brought  
pon a policy of insurance issued by the defendants to

the fourteenth day of February, 1865, insuring the  
st loss or damage by fire to the amount of \$2,500.00 on

works, ordnance stores, and other merchandise hazard-  
azardous, his own or sold on commission, or sold but

contained in a brick building No. 16 John street, in  
w York, for one year from issuing the same. Fire-

an fire-crackers were not mentioned in the list of haz-  
o the policy under the denomination of hazardous or

s, and it was provided by the policy that if at any  
e period for which it would otherwise continue in force

ould be used for the purpose of carrying on therein  
ccupation, or for storing or keeping therein any articles,

handise denominated hazardous or extra hazardous, or  
dous, in the second class of the classes of hazards an-

policy, except as in the policy specially provided for or  
ed to by the defendant, in writing upon the policy, from

long as the same should be so used, the policy should  
or effect. In the second class of the classes of hazards

policy, there was in the enumeration of articles under  
azardous, "fire-crackers in packages," and under the

hazardous, "matches, stocks of on sale." Articles de-  
cially hazardous are not mentioned in that class, but in

of the classes of hazards there are articles denominated  
azardous, and among them are "fireworks." It was fur-

in the policy that whenever gunpowder or any other ar-  
legal restriction should be kept in quantities greater

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than the law allows, or in a manner different from that prescribed by law, unless the use or keeping was specially provided for in the policy, the policy should be void. By an ordinance of the Common Council of the city of New York, to prevent the storage of fireworks within the limits of that city, adopted in June, 1856, it was ordained that no person should thereafter "store any fireworks of any kind or description other than Chinese fire-crackers within the limits of that city, except as in the ordinance provided." The ordinance provided that "fireworks excepting colored, pot, and lance wheels, and other works of brilliant-colored fires, not exceeding in value \$1,000," might be kept for retailing within the fire limits, from the tenth day of June to the tenth day of July of each year, and no longer, except by permission, such permission to be granted by the chief engineer of the Fire Department, and if any fireworks were kept in violation of the ordinance, the same might be seized by any police officer of the city upon an order of the mayor, and kept at some suitable place beyond the fire limits, sold on three days' notice, and the proceeds of the sale, after deducting the expenses of the seizure and sale, paid to the treasurer of the Fire Department for the use of the fund. On the twenty-sixth of August, 1865, a fire occurred in the building mentioned in the policy containing the insured property, which resulted in a total destruction of the property insured of the value of the sum for which it was insured. It appeared that about a week before the fire occurred, the defendant purchased a quantity of signal lights such as were in the ordinance called "works of brilliant-colored fires," his object being to fill an order from a customer, a few of which remained, and were among his insured goods when the fire occurred. The evidence tended to prove that he kept such goods constantly in his store, and that the risk of fire was not only greatly increased thereby, but that it originated in the "works of brilliant-colored fires" purchased and placed in his store about a week previous. Upon this state of facts the defendant's counsel asked the court to dismiss the plaintiff's complaint, but the court declined and the defendant excepted. The counsel then asked permission to address the jury on the question whether or not by keeping those goods the risk was increased, but the court held that there was no question for the jury, and directed a verdict for the plaintiff for the sum claimed by him, to which the defendant excepted; the jury rendered a verdict as directed, and the exceptions were ordered to be heard in the first instance at General Term, where, after hearing the exceptions, a new



red, and from that order the plaintiff appealed to the  
eals.

REYNOLDS, *for Appellant*,  
ND, *for Respondent*.

GRAY, C.

ct of insurance was against loss by fire on the plaintiff's  
works and merchandise, hazardous and extra hazardous.  
cription of fireworks to be found in any class of hazards,  
the policy denominated hazardous or extra hazardous, is  
there is mentioned in a separate class of hazards de-  
pecially hazardous, fireworks, but no mention is made of  
description; and inasmuch as there was at the time the  
insurance was made, an ordinance of the Common Coun-  
of New York, in force, prohibiting "works of brilliant-  
from being stored within the city limits, and as fire-  
various kinds and in different degrees dangerous, we  
esume that the agreement to insure the plaintiff against  
aded to cover an article so specially hazardous that he  
to store it, but that fireworks in the sense in which the  
ed, had reference to such fireworks as were in the pro-  
oted, or might by permission be kept for retailing. The  
article was kept in the defendant's store, surrounded by  
ndise covered by the policy, and the evidence at least  
rove that the risk was thereby increased, and hence, if  
le case the defendant was not entitled to a nonsuit, he  
o have the question whether the risk was not thereby  
omitted to the jury. The order for a new trial was  
ted, and should be affirmed.

## SUPREME COURT OF OHIO.

DECEMBER TERM, 1872.

*Error to Superior Court of Cincinnati.*

THE UNITED LIFE, FIRE, AND MARINE INS. CO.,  
*Plaintiff in Error,*

vs.

JOHN T. FOOTE, *et al.*, *Defendants in Error.\**

A policy of insurance against fire excepted from the risk any loss by an explosion. In an action upon the policy it appeared that an explosive mixture of whisky vapor and atmosphere had come in contact with the flame of a gas jet, from which it ignited, and immediately exploded, whereby a fire was set in motion, which destroyed the insured property. *Held*, that in such case it cannot be said that the destruction was caused by a fire within the meaning of the policy, but, on the contrary, that the loss was by fire, occasioned by the explosion.

In construing such policy wherein the exception embraces "any loss or damage occasioned by, or resulting from, any explosion whatever," the exception must be taken and held to include all loss and damage occasioned by any fire of which an explosion was the efficient cause.

Where such exception provided that the underwriter would not be liable for "any loss or damage occasioned by, or resulting from, any explosion whatever, whether of steam, gunpowder, camphene, coal oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor," and the property insured is destroyed by a fire occasioned by the explosion of one of the explosive substances named, and notwithstanding it is made to appear that at the time of taking the risk, such explosion, from the nature of the property insured, was in the contemplation of the parties, such loss falls within the purview of the exception, unless the particular peril by which the property was destroyed was expressly insured against, and a special premium paid therefor.

LINCOLN, SMITH WARNOCK, AND STEPHENS, *for Plaintiff in Error.*

MATTHEWS, RAMSEY, AND MATTHEWS, *for Defendants in Error.*

MCLLVAIN, J.

This proceeding is prosecuted to reverse a judgment rendered by

\* Decision rendered December Term, 1872. Syllabus by L. J. Critchfield, State Reporter of Ohio.



the Court of Cincinnati, at General Term, reversing a judgment at Special Term.

A legal action was brought, by the defendants in error, (who were plaintiffs therein,) against the plaintiff in error, (defendant in error,) to recover the amount of a policy of insurance, issued by the defendant to the plaintiffs, on the 9th of March, 1867, for a year, covering a stock of merchandise contained in a building of the plaintiffs' in the city of Cincinnati, which, together with the building, was destroyed by fire on the 11th day of April, 1867.

From the terms of the policy it appears that the plaintiffs were insured against "loss or damage by fire to the amount of five thousand dollars, their stock of merchandise, consisting principally of liquors, wines, and office furniture, contained in their brick building, situated at the southwest corner of Congress and Kilgour streets, in the city of Ohio, and occupied by them as a liquor store, with privileges of storing and manufacturing fine spirits by steam not generated in the building."

The principal defense arose under one of the conditions of the policy, which is in these words :

"This company is not liable for loss or damage by lightning or fire, unless expressly mentioned or insured against ; but will be liable for loss or damage to property consumed by fire occasioned by lightning. Nor will this company be responsible for any loss or damage to property consumed by fire happening by reason of, or occasioned by, any invasion, insurrection, riot, or civil commotion, or by military or usurped power, nor where the loss is occasioned by fraud, dishonesty, or criminal conduct of the insured, or by any loss or damage occasioned by, or resulting from any explosion of any substance, whether of steam, gunpowder, camphene, coal oil, gas, or any explosive article or substance, unless expressly insured against, and special premium paid therefor."

The plaintiffs counted upon the undertaking in the policy, and claimed a loss to be by fire.

The defendant set up the above condition for a *first* defense, and claimed that the said fire, loss, and damage referred to in the petition, was occasioned by, and resulted from, an explosion caused by a volatile explosive substance, and that the same was not expressly insured against, nor was a special premium paid therefor, and it denied that the loss was within the terms and meaning of the policy.

The defendant also set up, for a *second* defense, that the plaintiffs did not insure against the loss, and before the loss, carry on and exer-

cise *within* the building, up to the time of the fire, the trade and business of distilling and manufacturing spirits by steam generated, *in* the said building, contrary to the provision of the policy which is set out ; and by an additional answer, filed by leave of court, the defendants, for a *third* defense, pleaded that the plaintiffs had in operation in the building, up to the time of the fire, three large stills, which greatly increased the risk, and that these stills were concealed from them, and that they had no knowledge of the same. Replies were filed to these answers, putting the same in issue.

The issues of fact arising upon the defenses, set up by the defendant below, were tried, upon submission, by the parties, by the judge at Special Term, who found in favor of the defendant upon the first defense, and in favor of the plaintiffs upon the second and third defenses.

A motion to set aside the finding and for a new trial was made on behalf of the plaintiffs, and overruled. A bill of exceptions was then taken, setting out all the evidence, and judgment was rendered for the defendant.

A petition in error was filed in the General Term, and the judgment was reversed.

To reverse this judgment of reversal, and restore the judgment at Special Term in favor of the defendants below, it prosecutes the present petition in error. If it prevails, the litigation is ended by a final judgment ; if it fails, the cause will stand for a new trial.

The main question for decision by this court is, whether the Superior Court in General Term erred in law in reversing the judgment at Special Term.

And that question may be stated in this form : Did the facts proved on the trial at Special Term, when considered in connection with the terms of the eighth condition to the policy fairly construed, clearly sustain the finding of the court in favor of the defendant upon its first defense ?

I do not propose to repeat in detail the testimony set out in the record, but will content myself in stating the conclusions of fact, which in our opinion are clearly drawn from the testimony. It is proper to say, however, that the testimony in this case is remarkably free from contradictions. The only doubt that can possibly arise upon the evidence is as to the proper inferences to be drawn from facts clearly proven ; but these inferences, we think, are quite evident.

The testimony shows that, at the time of taking out the policy, and

of the fire, the plaintiffs were engaged in the business of distilling whisky, and manufacturing fine spirits by the use of a building occupied by them as a liquor store, and in which was a stock of merchandise, consisting principally of liquors,

The size of the building was sixty by one hundred feet, and was four stories high. There was communication between the stories through open stairways and hatches. The business was carried on in the basement story, where the stills and metallic vessels—were located. The upper stories were used for storage of liquors and cooperage. The process of distillation was conducted as follows: The raw spirits or liquor was drawn by means of pipes, called leaders, from tubs situate in the basement to the stills below; when the stills were thus charged, steam was converted into vapor by means of steam which passed through the stills in copper pipes, called worms; the vapor was then conducted by other pipes to a condenser, where it was condensed to a liquid state.

The process involved in the process of rectification is an inflammable mixture which readily mixes with the atmosphere, and when so mixed becomes explosive, and when such mixture is brought in contact with flame it explodes. On the morning of the fire a pipe being charged through a leader about two inches in diameter, passed into its still through a *vacuum valve*, (an aperture near its top,) the diameter of which was about four inches. At the same time steam was passing through the worm, condenser in the still into vapor, which escaped through the worm into the still-room, and thence no doubt into other parts of the building. The process of the thus charging the still, and the discharge of vapor, had continued for some time previous to the fire. During the progress of this process jets of gas were burning in the still-room, one at a distance of about four feet from the vacuum valve, and the other in the corner of the room. There was no other fire or flame in the building at the time.

Under the circumstances, an explosion took place in the still-room, and violent combustion of the vapor, accompanied and followed by one witness as being like the crack of a gun, as if a bundle of iron had been thrown on the pavement, as a crash, and by another, as a gush of fire, and instantly the flame was driven through a doorway into another room, whereby a witness was badly burned. Immediately

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after the explosion, a flame was discovered escaping from the still through the vacuum valve, and at the same time the building was discovered to be on fire throughout the several stories.

From these facts and circumstances we think it was clearly shown, that the fire, by which the building and stock of merchandise insured were consumed, was occasioned by and resulted from an explosion of spirit vapor mixed with atmosphere, and that the explosion was caused by the mixture coming in contact with the burning gas-jet.

1. The first question which we notice particularly is this : Was the explosion, which in fact occurred, such, in degree of violence, as was contemplated by the parties to the policy ?

The word "explosion" is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name, are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion. An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or accurate measurement, but by the common experience and notions of men in matters of that sort. In this case, although the building was not rent asunder, or the property therein broken to pieces, there was a sudden flash of flame, a rush of air, and a report like the "crack of a gun," which certainly brings the occurrence within the common meaning of word as used in many instances. "Any explosion whatever" is the phrase used in the condition to the policy, and it is qualified by the context only to the extent that it must be an "explosion" of some "explosive substance, and of sufficient force as to result in loss or damage to the property insured." And these characteristics we have found to exist in the occurrence that resulted in the loss of the insured property.

2. It is claimed that the fire which destroyed the property insured, did not result from the explosion, but, on the contrary, that the explosion was incident to and caused by the fire, which, if there had been no explosion, would have accomplished the whole loss and damage ;



at such inference, may be drawn from the facts in the and as legitimately as contrary inferences. unquestionably shows that the origin of the fire and the simultaneous. It may be true, in a strictly scientific explosions caused by combustion are preceded by a fire. may demonstrate, in a case where gunpowder is de- e, or in any case where the explosion is caused by or ac- combustion, that ignition and combustion precedes the ex- the common mind has no conception of such combus- independent of the explosion, where they concur in cession that no appreciable space of time intervenes. this policy must be taken in their ordinary sense ; and d that the proofs show, according to the ordinary sense ding of men in reference to such matters, that the ex- mined the fire, which destroyed the property insured ; or, , that the loss resulted from an explosion within the d meaning of this policy.

at the explosion was caused by a burning gas-jet, but uch fire, as contemplated by the parties, as the peril in-

The gas-jet, though burning, was not a destructive he immediate effects of which the policy was intended ; although it was a possible means of putting such rce in motion, it was no more the peril insured friction match in the pocket of an incendiary. The fact to which we thus arrive, are mere inferences from cts, however, about which there was no conflict in the they are so manifestly true, that we think it was error our statute, to reverse the judgment rendered thereon term of the Superior Court, upon the strength of con- s drawn from the same facts by the reviewing court.

question arises upon the terms of the policy, and is tion purely. Was it intended, by the provisions of dition, to exempt from the risks assumed by the poli- e occasioned by an explosion ?

that the clause exempting losses by explosion taken rned in connection with other clauses in the condition, such intention. It is true that the words "by fire," or t, are omitted in this clause, though expressed in some clauses. The foundation point, however, in construing is found in the general undertaking of the policy. It d that the underwriter undertook to insure against loss

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and damage by fire only ; but, nevertheless, against loss and damage by fire generally, and the maxim, *causa proxima, non remota, spectatur* applies. Now, we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses, which would otherwise fall within its scope and meaning. The first clause of the condition provides that "this company is not liable for loss or damage by lightning or tornado, unless expressly mentioned and insured against." If this were the whole of the clause, and it were not understood that the loss and damage referred to, were such as might result from *fire occasioned by lightning or tornado*, it would be utterly meaningless and nugatory, for the reason that the underwriter had not undertaken to insure against lightning or tornado. So far the construction is plain enough, but a difficulty arises from the conclusion of the clause, to wit : "but will be responsible for loss or damage to property consumed by fire occasioned by lightning." The exception to the rule of exemption from loss by lightning appears to be as broad as the rule itself. But I apprehend that a case might arise in which effect and operation could be given to all the terms of this clause, including those which are implied as well as those expressed. At all events, it is perfectly clear that loss and damage by lightning and tornado are not within the expressed risks of the policy, unless a fire supervenes ; nor is there anything in the policy from which such risks can be implied.

The condition continues : "Nor will the company be responsible for any loss or damage to property consumed by fire happening by reason of, or occasioned by, any invasion, insurrection, riot, or civil commotion, or any military or usurped power." The exemptions here provided for are expressly limited to losses within the terms of the general risk of the policy. But if such limitation had not been expressed, it would have been implied.

The next clause is as follows : "Nor when the loss is occasioned or superinduced by the fraud, dishonesty, or criminal conduct of the insured." There is no pretext for holding that the loss here contemplated is other than loss by fire, although no such qualification is expressed. Then follows the clause in question, which, to all intents and purposes, is framed like the preceding one : "Nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against and special premium paid therefor."

is something in the subject matter of this clause that the words "by fire" were omitted for the purpose of design and intention to adhere to and continue the general rule that an explosion should result in a fire, we think that the equivalent should be supplied by implication or construction.

purpose indicated by any fair use of the terms employed? Other than combustion, results from an explosion, when itself is caused by a destructive fire already in progress within the general risk of a policy against fire only, is a very reasonable in itself, but is sustained by authority. *Mer. Ins. Co.*, 11 Pet. 225; *Scripture vs. Low*, 10 Cush. 357; *Millauden vs. N. O. Ins. Co.*, 4 La. Ann. quite clear that a loss by fire, which is occasioned by an explosion within the like risk. Now, the express terms of this policy loss or damage occasioned by or resulting from any explosion. These terms are certainly comprehensive enough in descriptions of loss—whether loss by the explosive or superinduced combustion. And that such is their meaning has been directly decided in the case of *Stanley vs. West*, 10 La. Ann. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

by defendants in error, that the peril by which the property was destroyed was within the exception to the seventh clause, it was "expressly insured against, and special preference for;" or, in other words, was excepted out of the exception.

by which this proposition is sought to be maintained

of the policy covered loss by fire on liquors, etc., with the rectifying and manufacturing fine spirits by steam not the building. The property insured was whisky, as well

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in the process of rectification and manufacture as manufactured—whisky in the still, as well as spirits in the barrel—the whisky vapor itself, while passing through the columns to the cooler, or wherever else it might make its way. If it was in this form an *explosive substance or article*, such as is intended by the language of the condition, or if, in the process of manufacture allowed by the policy, it was likely to become such by escape and mingling with the air in the building, then the insurance was upon it, as an agent known to be explosive under certain circumstances likely to happen, and with the express assent of the company to the carrying on of that process, in the course of which its explosive nature would naturally and probably be developed.”

The principle sought by this argument to be applied, is announced in *Harper vs. New York City Insurance Co.*, 22 N. Y., 441 ; *Fitton vs. Accidental Death Insurance Co.*, 17 Com. Bench, N. S., 112.

In the case of *Harper vs. New York City Insurance Co.*, the condition exempted the company from liability *for loss occasioned by camphene*. The fire was occasioned by a workman's throwing a lighted match into a pan upon the floor containing camphene. The risk was upon a printing stock, privileged for a printing office, camphene not being expressly enumerated. But it was shown that that article was a usual part of such a stock, and its use was therefore authorized. For this reason alone, because it was implicitly insured, it was held that the exception did not apply.

The following extract from the opinion expresses its doctrine :

“ A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while, at the same time, it might exempt the insurer from loss if occasioned by the presence or use of the article. But I think it would need very great precision of language to express such an intention. When camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared.”

In answer to this claim, we say :

1. That the spirit vapor, having escaped from its confinement and passed into the still-room, where it became mixed with atmosphere so as to form an explosive substance, under circumstances that precluded all possibility of reclaiming and utilizing it, was no longer a part of the stock of merchandise insured, and was not under the protection of the policy.

the nature of the property insured, the parties, at the time it was taken, might reasonably have anticipated the peril which afterward destroyed, it is reasonable to suppose that the risk was in contemplation at the time, and that they contracted to insure against it. Hence, if the general risk of the policy was expressed in broad enough terms to include the peril, it must be presumed that the parties intended to do so; and on the other hand, if an exception was made in terms which fairly and plainly took the particular peril out of the general risk, it must be presumed that the parties intended to exempt such particular peril from the risk. If it is claimed that there was an exception to such exemption, and that the particular peril was saved from the exemption and included in the general risk, it is reasonable that the terms of exception should be at least as explicit as the terms of exemption. How is it in this case? The risk was against all loss by fire. The exception was "any loss or damage occasioned by an explosion of gunpowder, etc." The exception to this exemption was, "unless insured against, and special premium paid therefor." It only remains to be said, that no loss or damage occasioned by an explosion of any of these substances named was excluded against, nor was any special premium paid for any such risk.

It is therefore, that the judgment of reversal rendered at the Circuit Court must be reversed, and the judgment rendered at Special Term be affirmed.

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## SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1871.

*In Error to the Circuit Court of the United States for the District of  
Massachusetts.*

THE GREAT WESTERN INS. CO., *Plaintiffs in Error,*

vs.

WILLIAM THWING.\*

Merchandise, though used as dunnage, must nevertheless be regarded as cargo and as part of the ship's lading.

Articles for which freight is paid are merchandise, and part of the ship's cargo, though used as dunnage.

A warranty in a ship's policy "not to load more than her registered tonnage," will be broken by carrying more cargo in weight than such tonnage, though the excess be used as dunnage; whilst, if such excess had been mere dunnage, and not cargo, the warranty would not have been broken.

Mr. Justice BRADLEY delivered the opinion of the Court.

This was an action of assumpsit for money had and received, brought by the plaintiffs in error, citizens of New York, against the defendant, a citizen of Massachusetts, to recover back certain insurance which the plaintiffs had paid to the defendant in ignorance (as they alleged) of a breach of warranty by him. They had made him a policy on his ship "Alhambra," on a voyage from Liverpool to San Francisco, which policy was dated the 6th of October, 1863, and contained, amongst other things, this clause: "Warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage." The registered tonnage was 1,285 tons, and the vessel took

\* Decision rendered March 18th, 1872

pool, among other things, 1,064 tons of iron, 6 tons of 238 tons of cannel coal, being an excess over the register of 23 tons. The ship having sustained a partial loss the plaintiffs paid the money in question in ignorance of cargo, and base their claim to recover it back on the payment was made under a mistake of fact. It was set up that the 238 tons of cannel coal was not damaged.

The charter-party with James Starkie, of Liverpool, showed the charterer was to have the full reach of the vessel's cargo to pay 51 shillings for every ton of freight put on board. The master agreed with the charterer, in addition to the freight, that the latter should furnish 250 tons of coal for dunnage of the ship for the voyage, and that the charterer received the said 238 tons as dunnage, and stowed it and placed along the ship's bottom, fore and aft, as the captain signed a bill of lading for it; that it was not damaged; that he collected freight, 51 shillings per ton, for it in San Francisco the same as he did the rest of the cargo. It was better for dunnage than plank. The defendant offered evidence of experts to show that a cargo was not properly dunnaged, and that in cargoes from Liverpool coal is frequently used for dunnage, and, when so used, the cargo is liable to be crushed; that when cannel coal is used for cargo it is usually, though not always, stowed in a separate hold from what it is when used as dunnage, and that it is sold as dunnage on ship's account, and then is sold at the market on ship's account.

In testimony the plaintiffs' counsel asked the court to instruct the jury that, if freight was received and paid for this coal, the bill of lading was a warranty, although used as dunnage. The court refused to give the instruction; but ruled that if the jury believed, from the evidence, that the cannel coal was received and used as dunnage, and that it would not amount to a loading under the clause of the bill of lading, the bill would not be good, and the plaintiffs could not recover. Under this instruction the jury found for the defendant. The bill of exceptions was granted on the question as to the correctness of this ruling.

There is a considerable analogy between dunnage and ballast. The cargo is used for trimming the ship, and bringing it down to a draft, and is then safe for sailing. Dunnage is placed under the cargo to prevent it from being wetted by water getting into the hold, or

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between the different parcels to keep them from bruising and injuring each other. Webster's definition of dunnage is "fagots, boughs or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady." Lord Tenterden says: "It is, in all cases, the duty of the master to provide rope, etc., proper for the actual reception of the goods in the ship. \* The ship must also be furnished with proper dunnage, (pieces of wood placed against the sides and bottom of the hold,) to preserve the cargo from the effects of leakage, according to its nature and quality." —(Abbott on Shipping, Pt. IV., c. 5, § 1.)

It seems to be conceded by the plaintiffs that if the cannel coal can be regarded as dunnage, there was no breach of the warranty. In other words, it is conceded that when the assured warranted "not to load more than her registered tonnage," ballast and dunnage were not included in the warranty. And it is not pretended that the cannel coal used on this occasion was more than was proper for dunnage. Had some useless article been employed for that purpose, such as chips or blocks of wood, though weighing precisely what this coal weighed, and had no freight been paid for it, the insurance company could not have complained.

It is the master's duty to provide both ballast and dunnage necessary for the safe and proper transportation of his cargo. And it has been held that, in selecting materials for these purposes, even when he has chartered the entire capacity of his ship for articles which require ballast or dunnage, he is not precluded from taking articles on which he can realize freight. Thus, in the case of *Towse vs. Henderson*, 4 Excheq., 890, where, upon a charter-party, it was agreed that the vessel should proceed from Singapore to Whampoa, and there load from the agents of the affreighters a full and complete cargo of tea, and the master took in as ballast eighty tons of antimony ore, for which he received freight as merchandise, it was held that, if it occupied no more space than ballast would have done, he was entitled to do it. In that case a full cargo of tea (which was all that the charterer stipulated for) still needed ballast, which it was the duty of the ship-master to supply. Hence it could make no difference to the charterer what material was used for ballast, if it did not encroach upon the loading capacity of the vessel for tea.

The question still recurs, however, whether merchandise used for the purpose of ballasting a ship, or for the purpose of dunnage, and



as merchandise, can be considered as part of the ship's in the meaning of a warranty against an excess of load-limited amount, it being conceded that an equal quantity of ballast or dunnage proper would not be so regarded? Has the law right to import into the contract an implied qualification of a reasonable amount of merchandise proper for ballast or dunnage, not to be reckoned as loading within the meaning of the warranty? It is clear that the law does make the implied qualification of a reasonable amount of merchandise proper for ballast or dunnage shall not be regarded as loading within the warranty. Is it reasonable to extend that qualification to merchandise consisting of ballast or dunnage? If so, then, in the case of a cargo consisting of only one article, which needed no ballast or dunnage, the shipowner would be entitled to deduct a reasonable amount for ballast; and if there were a government regulation, that no ship could carry more cargo in weight than the amount of her registered tonnage, she would, on the same principle, be entitled not only to deduct ballast and dunnage (properly such) in addition to her cargo, but, where ballast and dunnage could be used, she would be entitled to carry an additional amount of cargo, and the legal allowance, equivalent to reasonable ballast and dunnage.

Such a construction could not be a sound one. It would be an arbitrary construction of the words of a law or contract. If the legislature in one case, or the parties in the other, were willing that such a qualification should be made, it would always be very easy to express terms. It would seem to be a dangerous practice to make it for them.

Every cargo that requires ballast. Many cargoes will themselves furnish ballast the ship. Cargo may be so assorted that some of it may act as ballast. And where a ship is doing business as a carrying business, it would seem to be the dictate of common sense and judgment so to assort and arrange the cargo (if practicable) as to dispense with the use of ballast properly so called. It means the whole carrying capacity of the ship is saved up and when this idea is acted on, those portions of the cargo are selected and used for trimming and settling the ship, and the cargo, in common and popular sense, be called ballast. But, nevertheless, it is not ballast in a legal or proper sense. They remain

the same may be said with regard to dunnage. Many cargoes require no dunnage whatever. They are composed of

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articles which will not be injured by water, nor by contact with each other. A cargo may be so assorted that some portions of it may be placed so as to keep the other portions dry, or prevent them from coming into mutual collision. It is manifest in this case, as in that of ballast, that a prudent and skillful master of a vessel will (if practicable) so assort and arrange his cargo as to dispense with dunnage proper. And yet, in a loose sense, the articles of merchandise which he uses to perform the office of dunnage, may be called dunnage. Still they are not legally nor properly such. If they are merchandise they are cargo, and form part of the vessel's lading. They will be subject to duties, and they will be covered by insurance on the cargo.

It is true that ballast or dunnage, even when clearly such, as shingle from the beach, wooden slabs, chips, or brush, may be sold for some small sum after the voyage is ended ; but that will not make it any the less ballast or dunnage as contradistinguished from merchandise. No person of ordinary intelligence would find any difficulty in making the distinction. Had such articles been used in the case before us, though of the same weight as the cannel coal, the insurance company could not have complained ; for it would not have been cargo. But when merchandise is used in lieu of dunnage, or to perform the office of dunnage, it does not lose its character as cargo ; and the insurance company have the right to treat it as cargo. And it is evident that no form of words which the captain and the charterer might use on the subject can affect the rights of the insurance company. It would be *res inter alios acta*.

In view of these considerations it seems to us that the charge of the court was calculated to mislead the jury on the question at issue. It was "that if they believed that the coal was *received and used as dunnage, and not as cargo*, it would not amount to a loading under the warranty of the policy." The evidence justified and required the instruction asked by the plaintiffs, namely, that if freight was received and paid for the coal, it *was* cargo, and came within the warranty. Here was an admitted fact, which gave character to the article, stamping it as merchandise. Freight is never paid for mere dunnage, any more than for the sails and rigging of the ship.

The argument that it made no difference to the insurance company whether coal or any other article was used as dunnage, is unsound. It does make this difference : if coal paying freight is merchandise, it is within the warranty ; if mere dunnage were used, it would not be within the warranty. And the company were entitled to the benefit

ults which the mutual self-interest of the parties would adopt. The company made their contract in view and on of all these considerations.

tion has been called to another case between the same the same policy of insurance, decided by the Supreme Massachusetts, and reported in 103 Mass. Rep., p. 401, in vision was made adverse to the views which we have ex- with all due respect for that intelligent and learned tri- after giving full consideration to the views presented in given in that case, we cannot bring ourselves to a differ- on from that to which we have come.

ment of the Circuit Court must be reversed, with instruc- e a *venire de novo* in the cause.

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## MISSION OF APPEALS OF NEW YORK.

JANUARY TERM, 1873.

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*Appeal from General Term of Supreme Court.*

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M VAN VALKENBERG, *Respondent*,

vs.

LENOX FIRE INS. CO., *Appellant*.\*

vided that the insurance might be, at any time, terminated at the op- e company on giving notice to that effect, and refunding a ratable of the premium for the unexpired term of the policy.

part of November the company gave notice to the plaintiff that I cancel the policy and return him the unearned premium *pro rata* expired time, but would allow him until the 6th of December to insurance elsewhere. On the 6th of December the policy was can- he books of the company, and the unearned premium calculated, to \$24.46, which was subject to the call of the plaintiff. On the ember the plaintiff's agent called at the office of the company and e money and signed a cancellation receipt. The property insured yed by fire on the 25th of December, and the fact was unknown to

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dered January Term, 1873.

the company and to the plaintiff's agent when the money was received and a cancellation receipt given.

By the fire of the 25th of December, the contingency on which the liability was made to depend, had occurred, and the company was an absolute debtor to the plaintiff for the amount of the insurance. The negotiations after this time did not relieve the company of its liability.

The condition of the policy for the termination of the insurance by the company was not complied with. By that condition the company was required to give notice that the insurance was then and there and by the notice terminated ; and that it would be terminated at some future time.

By the condition of the policy the company was also bound, in order to terminate the insurance, to pay the plaintiff a ratable proportion of the premium, and for this purpose the company was bound to seek the plaintiff and tender him the amount.

The amount paid was less than the ratable proportion of the premium. It was the business of the company, in making the payment, to be certain that enough was paid.

Authority to an agent to apply to a company for permission to make an addition to a building does not authorize him to consent to an abandonment of the insurance.

This action is founded upon a policy of insurance issued by the defendant on the 23rd of May, 1865, to one George Brown. The policy was assigned by Brown to the plaintiff on the 11th day of July, 1865, with the assent of the defendant, and on the 25th of December, 1865, the buildings covered by the policy were destroyed by fire. The only question in the case is, whether at the time of the destruction of the premises by fire, the contract of insurance was in force and binding on the defendant.

The judge at the circuit held that it was, and directed a verdict for the plaintiff for the amount of the claim. This was affirmed on appeal to the General Term of the Eighth District, and judgment was ordered to be entered upon the verdict with costs. From the judgment thus entered the defendant appeals to the Court of Appeals. The facts on which the question arises are stated in the opinion of the court.

S. HAND, *for Appellant.*

GEO. WADSWORTH, *for Respondent.*

HUNT, COM.

The answer of the defendant admits the making and assignment of the policy, and alleges in defence, that before the occurrence of the loss by fire on the 25th day of December, the policy of insurance had been surrendered and cancelled, and the *pro rata* premium for the unexpired term paid to the plaintiff, in pursuance of one of the conditions in the policy of insurance.



referred to is in the following words: "II. This policy is to be terminated at any time at the request of the assured. In any case the company may retain only the customary unearned premium for the time the policy has been in force. The insurance may at any time be terminated at the option of the company on terms to be agreed to that effect, and refunding a ratable proportion of the unexpired term of the policy."

In the latter part of November, 1865, the company gave notice to the plaintiff, who is claimed to be the agent of the plaintiff, that they would cancel the policy and return him the unearned premium, *pro rata* for the unexpired time, but would allow him until the sixth day of December, 1865, at 12 M., to place the insurance elsewhere, after which the assured was to surrender all claim to the policy.

On the first day of December the policy was cancelled on the terms of the policy, the unearned premium was calculated, amounting to \$24.46, and the money was subject to the call of the plaintiff.

On the first day of December, Mr. Hansen called at the office of the company, received the \$24.46, and signed a cancellation receipt. The policy was destroyed by fire on the 25th day of December, and the loss was unknown to the company, and to Mr. Hansen, when the policy was cancelled on the 30th of December took place. No offer or tender of money was made by the company to Mr. Hansen or any one, nor was any money actually paid to any one, until the first day of January. The policy commenced May 23rd, 1865, was to run for one year, and the sum of \$66.66 was paid for the insurance for the year.

Of the facts I am of the opinion that the judgment was correct for the plaintiff. By the fire of the 25th of December the character of the contract became changed. It had before been a contract of indemnity and contingent. It now became fixed and certain. The basis on which the liability was made to depend, had occurred. The company was an absolute debtor to the plaintiff for the insurance. The negotiations after this time could not alter the company of its liability. The receipt by the plaintiff of the \$24.46, in discharge of an indebtedness of \$1,600.00, could not accomplish that result unless accompanied by a technical legal discharge. A debt cannot otherwise be discharged by a payment of only of the amount of the debt.

The conditions on which a discharge was authorized were not

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By the condition given in the policy, the insurance may be terminated at the option of the company. The mode of terminating the contract under this condition is clearly pointed out.

1. "On giving notice to that effect,"—that is, giving notice that the insurance was then and there, and by the notice, terminated, not that it would be terminated at some future time.

2. By "refunding a ratable proportion of the premium for the unexpired term of the policy."

The claim of the company is, that by the notice which I have recited, the insurance terminated on the 6th of December, on which day they entered a cancellation in their books. Passing by the other questions, I remark : 1. That no ratable proportion of the premium was on that day paid or tendered to the plaintiff or to any one in his behalf. One who has a payment to make is bound to seek his creditor, and when found to tender him the debt due. It is not the duty of the creditor to seek the debtor and demand the money. A suit for money due may be brought at the instant of the maturity of a debt, without previous demand, and this can only be avoided by a prompt tender by the debtor. Nor was such payment or tender made until after the liability of the defendant became fixed and absolute by the fire of December 25th. Until such tender or payment, the cancellation rested upon a notice merely. The defendant gave notice that, on a day named, it would hold the contract to be at an end. There was no provision in the policy, nor is there authority of law for a cancellation by notice, unaccompanied by payment of the money.

2. The payment actually made was insufficient in amount. It was the business of the defendant, in making the payment, to be certain that enough was paid. "A ratable proportion of the unexpired premium" must be paid. This is a positive condition precedent, upon the performance of which their release depends. In case the policy is terminated at the request of the assured, it is provided that the company may retain the customary short rates, for the time the policy has been in force. Not so, however, when the policy is terminated by the option of the company. In that event the company must refund a ratable proportion of the premium for the unexpired term. The entire premium was \$66.66. The entire term was three hundred and sixty-five days. The unexpired term, viz., from December 6th to May 23rd, was 168 days. The arithmetical proposition is this, as 365 days is to \$66.66 so is 168 days (the unexpired time) to the answer ;  $365 : 66.66 :: 168 : \text{The answer is, } \$30.68$ . In other



premium amounts to  $18\frac{26}{100}$  cents per day. For 168 days  
 68. This was the sum to be refunded as a condition to  
 ment of the policy. The sum actually refunded was only  
 ttle by \$6.22.

od when the policy was alleged to be terminated should  
 to be December 30th, when the money was actually paid  
 en, the amount paid would still be insufficient by the  
 \$1.84. There is no principle however upon which any  
 tion can be made than from the sixth of December. If  
 was terminated at all, it was on and as of that day.  
 e entry in the defendant's books, and such is the legal  
 r notice, if effectual for any purpose.

ansen cannot be held to be the agent of the plaintiff, to  
 a abandonment of his insurance. The plaintiff at the ut-  
 thorized Hansen to apply for permission to make an ad-  
 building. A notice to him on that subject would doubt-  
 n competent. It is quite too much, however, to make  
 of an agency by which he could terminate the contract.  
 on is not authorized by the premises.  
 ent should be affirmed with costs.

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MISSION OF APPEALS OF NEW YORK.

JANUARY TERM, 1873.

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*Appeal from General Term of Supreme Court.*

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ALEXANDRE, *et al.*, *Appellees*,

vs.

MUTUAL INS. CO., *Appellants*.\* }

y their policy insured a brig belonging to the plaintiffs, and valued  
 0, against perils of the sea, to the amount of \$8,000.00. The policy  
 t "in case of any loss or misfortune, it should be lawful and neces-

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red January Term, 1873.

sary to, and for the insured, their factors, servants, and assigns to sue, labor and travel in and about the defence, safeguard and recovery of the said vessel or any part thereof, without prejudice to the insurance made by said policy and that the said company would contribute to the charges thereof, according to the rate and quantity of the sum insured by said policy."

The brig was driven ashore in a gale on the main reef near Key Chappell, and badly damaged, after which she returned to Balize, when it was found that she needed extensive repairs. In taking the brig back from the reef to Balize, unloading her, taking care of her and her cargo, and ascertaining the nature and extent of the damage sustained, expenses were incurred, the proportion of which applicable to the brig, as specified in a general average statement, was \$581.18. Temporary repairs were made at Balize amounting to \$8,769.74, and after the return of the brig to New York, full repairs to the amount of \$4,547.21.

The suing and laboring clause in the policy has reference to charges not covered by the insurance, and does not embrace losses caused by damages to the property insured. It has application in the present case only to the general average expenses that had been incurred.

The subsequent expenditures were made to repair damages covered by the risks insured against, and were clearly payable under the insuring clause, and consequently do not come within the terms or meaning of the agreement to "sue, labor and travel" for the benefit of the property insured.

The insured could not, independently of the suing and laboring clause, recover for the excess of the cost of repairs, over and above the amount of the insurance, on the ground that the underwriters were liable, upon the general principles of the contract of insurance, to pay for expenditures incurred to prevent or diminish the extent of the loss.

The underwriters, by assenting to such action in regard to repairs at Balize, as the agents of the insured might see fit to take, did not bind themselves to pay any excess of expenses beyond the amount of the sum insured by them.

The underwriters are liable, over and above the sum insured, for four fifths of \$581.18, the vessel's proportion of the general average expenses.

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The rights of the insured, under the suing and laboring clause, were not prejudiced by the non-existence of an abandonment.

The repairs at Balize were not about the "defense, safeguard or recovery" of the vessel, but for her improvement. Expenses for the safeguard of a ship cannot properly be said to be those by which she is put in a condition of seaworthiness.

This was an appeal by the defendants from the judgment of the General Term of the Supreme Court, in the First Judicial District, entered on a verdict in favor of the plaintiffs after hearing exceptions ordered to be heard there in the first instance.

The action was brought on a policy of insurance issued by the defendants to the plaintiffs, by which an insurance was effected against perils of the seas, to the amount of eight thousand dollars upon their brig E. F. Newton, afterwards called the Antonio Mathè, valued at \$10,000 for one year, from the 11th day of July, 1864.

She sailed from Balize, Honduras, on the 27th day of August, 1864, with a cargo of logwood, mahogany, etc., bound for New



the following day she was driven on shore in a gale on the  
 ar Key Chappell. Two days thereafter, she drove over  
 loss of forefoot and leaking badly. She then returned  
 here the cargo was discharged. Surveys were subse-  
 when it was found that her bottom had been considera-  
 and that she required extensive repairs.

could not be brought on in her, and it was sent forward  
 els.

the brig back, from the reef to Balize, unloading her  
 care of her and her cargo there, and ascertaining the na-  
 t of the damage sustained on the reef, and before it  
 l to send forward part of her cargo by another vessel,  
 es were incurred specified in a general average state-  
 portion of which applicable to the said brig was five  
 eighty-one dollars and eighteen cents. Temporary re-  
 de at Balize at a cost, including the cost of exchange,  
 and when she reached New York she was repaired in  
 ense, after deducting one third new for old, of \$4,547.-  
 umstances under which these repairs were made are  
 opinion of the chief commissioner.

nary proofs of loss and interest were served on the 20th  
 865, and this action was commenced in the following  
 efendants after its commencement paid the plaintiffs the  
 ousand dollars, the amount insured by them, with in-  
 s accrued to that time, and claimed in their answer  
 al that such payment discharged their liability.

s claim on the trial eight tenths of the following sums,  
 g the \$8,000.00 paid, viz.:

portion of general average.....	\$581.18
ary repairs.....	8,769.74
airs.....	4,547.21
g the aggregate sum of.....	\$13,898.13

e claimed was \$3,118.51, with interest thereon from  
 35, amounting to \$163.72. At the close of the testimo-  
 ants moved for a dismissal of the complaint on the  
 appeared by the evidence that the liability of the de-  
 r the policy had been satisfied. The motion was de-  
 decision the defendants' counsel excepted. The court  
 a verdict for the plaintiffs for the full amount claimed

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by them, viz., the sum of \$3,282.23. To this direction the counsel for the defendants excepted.

The jury found a verdict for the amount directed, and the court ordered the said exceptions to be heard in the first instance at General Term, and that judgment on the verdict be in the meantime suspended.

The General Term ordered judgment in favor of the plaintiffs, and the defendants have appealed therefrom to the Court of Appeals.

JOSEPH H. CHOATE, *for Appellants,*

JAMES C. CARTER, *for Respondents.*

LOTT, CH. C.

The plaintiffs received upwards of three thousand dollars beyond the amount insured by their policy of insurance, and the exception taken by the defendants at the trial present the question whether any portion of that excess was properly chargeable to and recoverable against them. They now concede their liability on account thereof to the amount of four fifths of \$581.18, the vessel's proportion of general average expenses shown to have been properly incurred, and admitted to be chargeable to them under what is called the "suing and laboring" clause in the policy. The plaintiffs claim that the same clause makes them liable for the residue of such excess, which was allowed for repairs to the vessel after she returned to Baliza. It therefore becomes material to refer to its terms. It provided that in case of any loss or misfortune it should be lawful and necessary to, and for the insured, their factors, servants and assigns, to sue, labor and travel in and about the defense, safeguard and recovery of the said vessel or any part thereof without prejudice to the insurance made by said policy, and that the said company would contribute to the charges thereof according to the rate and quantity of the sum insured by said policy.

That provision has reference to charges not covered by the insurance, and does not embrace losses caused by damages to the property insured. Its object was to secure diligence in its preservation and protection, and thereby prevent a loss or reduce its amount, and to provide compensation for the labor done and expenses incurred in accomplishing that end. It has application in the present case only to the general average expenses that had been incurred. The subsequent expenditures were made to repair damages covered by the risks insured against, and were clearly payable under the insuring clause. They consequently do not come within the terms or meaning

ment "to sue, labor and travel" for the benefit of the insured. The two provisions, as I have stated, relate to different rights, and the right to compensation and payment under the policy necessarily excludes a right to a claim or demand under the policy.

The above expressed lead me to the conclusion that no portion of repairs above the sum insured was recoverable under the policy, and also show that the claim on the part of the plaintiffs, that they could, independent of that clause, recover for excess of repairs on the ground that the underwriter violated the general principles of the contract of insurance to indemnify the insured for all losses incurred to prevent or diminish the extent of the loss. No such expense was in fact incurred, or at least not of a general average character, admitted by the defendants as before stated. It then remains to be considered whether the recovery of such excess can be sustained on any ground. It is claimed by the plaintiffs that the defendants are bound by a special agreement to pay it, and that was the ground on which the general Term placed their decision in ordering judgment for the plaintiffs.

It occurred in that conclusion. When the vessel returned to New York, the plaintiffs ascertained that she required extensive repairs, and the master thereupon wrote and sent a letter to the plaintiffs informing them of the nature and extent of the damage, the heavy expense that would be necessary to be incurred in making such repairs, and the time which would be required, and after making it known to the plaintiffs that she might, after making certain repairs, proceed on her voyage with safety for full repairs, he asks for their instructions.

Receipt of this letter by the plaintiffs, they took it to the defendants and consulted them as to what should be done, and it was decided that the vessel should be temporarily repaired at Balize, New York for permanent repairs. The defendants retained the master to write to the master and instruct him in the matter. They thereupon wrote him a letter on the fourth day of May, 1844, which, so far as it is material to ascertain the intention of the defendants, contains the following directions :

The defendants consulted with the underwriters, and they leave the matter in their own hands. We therefore request you to consult with the underwriters. Mathè, in all matters concerning the brig. We wish

ST. M. CO. D. AW. L. B. COPY



to put only such repairs as will be considered perfectly safe to bring the brig to this port. \* \* \* In a word, whatever you and Mr. Mathè decide about the brig is approved beforehand."

This letter before being forwarded was exhibited to the defendants and they wrote at the foot thereof as follows :

" *Office Sun Mutual Ins. Co., November 4, 1864.*

" We, as the underwriters on the hull of brig Anto. Mathè, concur in the above.

" *E. R. ANTHONY, Vice-President.*"

This is a mere assent to such action as the assured might deem it advisable to take in reference to the matter. At that time the expense of the necessary temporary repairs at Balize had been estimated by a master shipwright at \$1,500.00, and it was the opinion of another that \$2,500.00 would be nearer the amount, and the general tenor of the master's letter indicates his opinion that they would not much, if at all, exceed that sum, and that it would be for the interest of all parties to have those made, and postpone the making of full repairs till the arrival of the vessel at New York ; but he does not suggest that it could not be fully repaired at Balize, or that the damage was so great as to justify an abandonment. Under such circumstances the plaintiffs, as owners, and the underwriters had mutual rights and interests to be protected, and it was very proper, if not in fact necessary, that the latter should be consulted in reference to the repairs to be made, and particularly whether the entire or only a partial expenditure therefor should be made at Balize. There was no thing said by the plaintiffs to the underwriters giving color to the idea or suggestion that the latter were to assume the responsibility of the entire cost, or that they were to be held liable beyond the amount of the sum insured by them ; and they, in expressing their concurrence in the instructions given by the plaintiffs to the master declared to be given as "underwriters," clearly intending to limit or qualify their assent by the nature of their liability as such "*under writers*," and to that extent only, and not to change their relation to the vessel or owners.

Nothing was said by them to warrant the inference that they made or intended to make the master their agent in procuring the repairs to be made.

Their liability under the terms of their policy to contribute to the loss to the extent of the amount of their subscription or sum insured

it their interest to have the repairs made on as near as possible, and it was important to the plaintiffs, who the residue of such loss, not only that the expenses incurred should be reasonable, but that there should be no loss after they had been incurred in reference to the amount as therefore well and provident that there should be a binding agreement on the subject before any expenditures

be added that although it is said in the statement of the trial, and which had been previously agreed upon the counsel of both parties, that the repairs which, on the vessel, were found to be necessary, "could not be made at Balize." It is evident from the letter of the plaintiff which was not his understanding nor the result of his intention at the time he wrote it : but that his advice or opinion in propriety of only making temporary repairs there, was not extravagant charges that would be made, and that the repairs might be as well or efficiently performed as at New York ; there have been doubted whether in that case they would have been making temporary or partial repairs only at that port ; consultation by them with the defendants in reference thereto, concurrence in the directions that might be given to the master, may have been deemed necessary. Such action was taken in the exercise of a proper precaution against subtleties ; but it did not change or in any way affect the rights or liabilities of the parties.

that the defendants cannot be charged or held liable on the ground that they had entered into a special agreement to pay the repairs, and the court below erred in holding that such agreement was binding.

therefore be a reversal of the judgment appealed from, and the plaintiffs consent within twenty days after notice of filing in the Supreme Court to the reduction of their verdict, to four fifths of \$581.18, the vessel's proportion of the repairs and expenses, with interest thereon from 20th June,

if consent is given, then the judgment is affirmed for that interest thereon. If such consent is not given, then the judgment must be reversed, and a new trial ordered. No costs are to be given to either party on the appeal to this court.

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HUNT, C.

The defendants have paid the sum of eight thousand dollars, the amount specified in the policy, and deny their further liability. The question is, whether by virtue of the policy simply, or in consequence of the clause authorizing the insured to sue and labor, or in consequence of the correspondence which occurred, the defendants are liable beyond the amount underwritten by them upon the brig.

The clause referred to made it "lawful and necessary for the assured, their factors, servants and assigns, to sue, labor and travel in and about the defense, safeguard, and recovery of the said vessel or any part thereof, without prejudice to the insurance made by said policy; and that the said company would contribute to the charge thereof, according to the rate and quantity of the sum insured by the said policy."

The object of this clause is said by Arnould to be to permit the assured to take every measure for the recovery of the property, without waiving his right of abandonment, and to bind the underwriters to contribute to reimburse the expenses incurred. Although the language of the clause is permissive only, it is well settled that it is the clear duty of the assured to labor for the recovery and restitution of the property. Arnould on Ins., § 29.

The objection is made in the outset, that the policy is an instrument of indemnity to a certain amount, and that no liability for a single loss can exceed that amount, and such further expenses as may fall under the suing and laboring clause. Although it is generally true that the liability of the underwriter is limited to the amount of his subscription, there are many instances given in the books where a greater liability is incurred. In *Livie vs. Janson*, Lord Ellenborough said: "There may be cases in which, though a prior damage be followed by a total loss, the assured may have rights or claims in respect of the prior loss which may not be extinguished by the subsequent total loss. Actual disbursements for repairs, in fact made in consequence of injuries by perils of the seas, prior to the happening of the total loss, are of this description." 12 East, R. 655.

Phillips says: "In England and the United States the underwriters are unquestionably liable for a subsequent total loss, in addition to the expense of previous repairs, which have been previously paid for by the assured, in distinction from those made by means of funds raised on bottomry. That is, the insurer is liable for the expense of the repairs, and is also liable for subsequent damage to the



of the ship." 2 Phil. on Ins., § 1,267. These authorities conflict with the appellants' position, as in the cases putative losses, while the appellant's proposition is limited to a single loss. In respect to the item of \$581.18, generated by getting off the vessel and running her to the Balize, it is clear that it is a proper charge upon the underwriters' subscription, although there was but a small loss. The expenses of salvors and lighters must be paid at all times whether anything is saved or not, and although they are not a loss to an amount greater than the sum insured.

The Marine Ins. Co., 7 J. R., 412, it was held that the underwriters are entitled to recover, as for a total loss, and also for all the expenses in endeavoring to save the property. See, also, *The same*, ib. 431, and *Watson vs. the same*, ib., p. 57.

The policy with the laboring clause included, and it is not the duty of the underwriters to pay for any loss or damage to the property that certain sums beyond the amount underwritten are recovered. The contention is as to the extent of such a loss, an expenditure intended for temporary repairs, in the difference of exchange and the high price of labor, as stated in the briefs, to the sum of \$8,769.76, while the permanent repairs after the vessel reached New York, were made at an expense of \$7.21, be recovered against the underwriters? I suppose the amount of the expense cannot determine the question. It is an element in the case, but I state the fact as it exists in the case. If a recovery can be had against the underwriters governing the amount is declared to be "according to the value and quantity of the sum insured by said policy." The value of the vessel at \$10,000.00, and the sum insured being \$8,000.00, the quantity of the sum insured is eight tenths. This proportion, of the expenses of the temporary repairs, if any, is to be paid by the underwriters.

As quoted there are three purposes for which the assured are required to sue, labor and travel, viz. 1, the defense; 2, the recovery of the vessel, and 3, the recovery of the vessel. In the cases against the Insurance Company above cited from Johnson's Reports, the vessel had been seized by hostile powers, and condemned as prize, the expenses for which the underwriters were held liable incurred in endeavoring to defend the right of the owners of the vessel. They were expenses incurred in the safeguard or recovery of the vessel. Either term would cover them. In *The Empire Mar. Ins. Co.*, Law Rep., 1 Com. Pleas,

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p. 535, the plaintiff had effected a policy on the charter freight of guano from the Chincha Islands to Great Britain. The vessel encountered a storm and put into Rio so damaged by the perils of the sea as not to be worth repairing, and was sold. The guano was landed and stored at Rio, and the master procured another vessel to carry it to Bristol at an agreed freight of £2,400, which the plaintiffs paid and received the freight from the consignee. An expense of £100 was also incurred at Rio in landing, storing and reloading the guano. It was held that the plaintiffs were entitled to recover under the suing and laboring clause, the expenses so incurred, and the freight of £2,400, notwithstanding there had been no abandonment. Two principal considerations controlled the decision of this case. First, the freight insured would have been totally lost unless the expenses had been incurred. It was not due until and upon the delivery of the cargo in Great Britain; stopping at Rio, no part of it was due *pro rata itineris*. When the loss occurred the master was authorized to procure another vessel and forward the cargo, and when thus forwarded, he would be entitled to the freight. While the cargo remained in Rio, the subject of the insurance was entirely lost. The additional expense was incurred in the safeguard and recovery of the subject insured, and hence it was held to be within the clause we are considering. It may be observed in passing that the amount insured upon the charter freight was £2,000, while the sum thus expended in the safeguard and recovery of the freight was over £2,500. The second important decision in the case was, that it was not necessary that an abandonment should have taken place, by which the property would become substantially that of the underwriter. The learned judge says, "The meaning is obvious that if an occasion should occur in which, by reason of a peril insured against, unusual labor and expense are rendered necessary to prevent a loss for which the underwriter would be answerable, and such labor and expense is incurred accordingly, the underwriters will contribute, not as a part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labor bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to about what they would have had to pay if such detriment had come to a head for want of timely care \* \* \* In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty



to the expenses incurred." P. 543. This case was appeal to the Exchequer Chamber upon substantially the same facts on which it was placed in the Com. Pleas. 2 Law Rep., 357. This case is a clear authority that the plaintiff's case before us are not prejudiced by the non-existence of the vessel. On the other branch of the case the argument is strong. The vessel was in port at Balize. The general expenses of \$581.00 had been incurred, for which the defendant is responsible. There she was, and such as she was, her owners could use her in their discretion. It was not like a frigate which required an expenditure to give it an active service. The vessel was present in port physically. How much worth there before the repairs, or how much she was worth after the repairs, does not appear, nor does it appear whether she was worth more or less there than in New York. But she had some value.

It can be said that the repairs at Balize were for the "safeguard or recovery" of the vessel. She needed a safeguard. She was quietly in the port of a friendly country, safe from storms or perils, nor was any expense incurred for her recovery. She was in the master's hands, and no one proposed to interfere with her. Although she had been safe at sea, she was safe in port. Expenses for the repairs of a ship cannot properly be said to be those by which the condition of sea-worthiness. The two ideas are essential. The sum of \$8,769.00 spent at Balize was for the benefit of the vessel rather than for her safeguard, defense

and down the general rule that "An aggregate of losses exceeding the amount of the insurable interest of the subject in the event of a loss is not recoverable in cases of general average and total loss."

For this he cites the cases in Johnson which I have not seen, and the present case when decided in the court below.

*Indian Peninsula Railway Co. vs. Sanders*, is frequently cited. *Best & Smith*, (101 Eng. C. L. Rep., 41,) Aff'd, 2 B. & C., 266. In that case the policy was with the warranty of particular average unless the ship be stranded, sunk or lost, and it was upon the effect of this warranty that the chief argument was made. The plaintiff procured an insurance upon the ship at London by a policy with this condition un-

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derwritten. It was held that this was a stipulation against total loss and general average only. The ship experienced such heavy damage that she was obliged to put into Plymouth, and was unable to proceed. The plaintiff shipped his rails by another vessel at an advanced price, and this he sought to recover from the defendants. The ship was neither stranded, sunk or burnt, and it was held that it could not recover, although there was constructively a total loss of the ship. The court says in closing, "It was however further argued by Mr. James that the plaintiffs were entitled to recover under the clause which authorized the insured to sue and labor for the preservation of the subject matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is under this clause liable for expenses incurred by the assured for the purpose of rescuing the subject matter of an insurance from a state of peril, which might have resulted in a total loss, but did not. There are reasons for and against this stated by Mr. Phillips in his treatise on Insurance, (§ 1,777,) and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here are incurred in forwarding the subject matter of insurance to its destination, at a time when the iron was not in any peril of a total loss, either actual or constructive."

The authority of this case is against the plaintiff as far as it is an authority. But it is so different in its facts that it can scarcely be called an authority.

Upon an examination of all the cases to which attention has been called, I have not been able to find any that would authorize this recovery. Nor do I think it comes within the spirit of the contract. Had full repairs been made at Balize, the defendants would have been liable for them only to the amount of their insurance. The repairs were made for the improvement of the vessel, and these, it has been held, are not within the suing and laboring clause. The expenses were not incurred for the defense, safeguard, and recovery of the property. There was no impending disaster against which they found a protection. In my opinion, neither upon this clause, nor upon the general terms of the policy, can the claim of the plaintiffs be sustained.

The question remains whether the defendants altered their position by what took place on the fourth of November, 1864. About the 30th of August, the vessel had been got off from the rocks and taken into Balize. It was found upon examination that she required extensive repairs. Such repairs could not well be done where she

On the 7th of October, the master wrote to the plain-  
vessel could get to some other southern port with very  
; that the southern ports were closed, except Havana,  
expensive, and that the work on the vessel was stopped.  
estimate of one mechanic for the repairs at \$1,500.00,  
at \$2,500.00, stating some particulars of the damage and  
of what repairs would be necessary to carry her to New  
receipt of this letter it was taken to the defendants, a  
was held, and "it was determined that the vessel should  
y repaired at Balize, and sent to New York for perma-

The plaintiffs thereupon wrote to the master on the  
ber, to the effect that the underwriters had left the  
ir hands, and they requested him to consult with their  
o Mathè. "We wish you to put only such repairs as  
ered perfectly safe to bring the brig to this port. \* \*  
whatever you and Mr. Mathè decide about the brig is ap-  
hand." Upon the letter the defendants wrote as fol-  
as underwriters on the hull of brig Antonio Mathè,  
above. E. R. Anthony, Vice-President."

ement did the parties to it understand that the defend-  
d to a contingent increase of their liabilities, that they  
assume responsibilities not then resting upon them, or  
ver of objections that might be made as to the time,  
umstances in which their liability, as it then existed,  
ced to form and shape? Both parties are assumed to  
ne general principles governing the defendants' liability.  
doubt the case in fact. Those principles are as follows :  
nderwriter was liable for his proportion of the general  
ses in getting the vessel off from the rocks into Balize.  
proved to be damaged to more than half her value the  
abandon, and the liability for \$8,000.00 would at once  
at if damaged to less than that extent, and repairs  
n her where she lay, the underwriters would be liable  
hs of such repairs, provided it came within the limit of  
his was the precise condition, and these were the pre-  
s of the parties. With these views in their minds, the  
orize the master to make such repairs as will bring the  
to New York. The master was in perplexity ; should  
essel repaired at Balize ? should he take her to Havana ?  
es were enormously large at Balize, and they were there  
d the underwriter be responsible ? should he risk a trip

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to New York on slight repairs? what would be for the interest of owners? To relieve him the plaintiffs direct him to make the repairs at Balize, and the defendants concur in the direction. They authorize him, in conjunction with M. Mathè, to act as his judgment shall determine.

Under this authority the master might have abandoned, if the facts were such as to justify it. He chose to make repairs. I cannot think that in adopting either course the legal relations of the parties were or would be altered thereby. The plaintiffs were still the parties assured; the defendants were still the underwriters. The obligation connected with their relation remained as before. The details of the evidence by which to fix the liability were in some respects altered. The defendants would not be at liberty to say that repairs should not have been made in a port so expensive, or to so great an extent that they could not challenge items. They could not insist that there should or should not have been an abandonment. They had authorized the master and M. Mathè to decide those questions, and must submit to their judgment. But they did not authorize any alteration of their relations with the plaintiffs, nor do they give the slightest intimation that they were willing to assume any new obligations. It was a liberal, courteous waiver of all technical objections that might arise, which it is unreasonable to attempt to wrest to their injury. It was as if they had said: "We are liable for eight tenths of the repairs not exceeding \$8,000.00. We are liable to that amount if there is a total loss. You have an agent and a friend on the spot who are sensible men. We are content that they should decide what had better be done, and we will pay according to our liability on these principles." This is the essence of the authority, and I can find in it no warrant for the judgment rendered.

Upon the whole case, I think judgment must be reversed and a new trial ordered.

PREME COURT OF MINNESOTA.

al from District Court of Hennepin County.

PRICE AND LIZZIE D. PRICE, BY THEIR  
ad litem, ELON DUNBAR, Respondents.

vs.

MUTUAL LIFE INS. CO., Appellant.\*

upon a life insurance policy upon the life of Richard Price. By the policy defendant promises to pay the sum assured to Anna D. of said Richard, upon whose application and for whose benefit the policy was issued. The policy further provides as follows: "In the event of the death of the said Anna D. Price before the decease of said Richard Price, the amount of the said insurance shall be payable to said Anna D. Price for her use, or to their guardian, if under age, within ninety days after notice and proof of the death of said assured." Anna D. Price brought this action before her said husband,

and that it was not necessary to bring the same in the name of a guardian.

for the policy is therein expressed to be the representations contained in the application for the policy, and the premium paid and the policy contains the following provision: "Provided always, that it is hereby declared to be the true intent and meaning of this policy, and accepted by the assured upon these express conditions, that if any of the declarations or statements made in the application for this policy, of which this policy is issued, shall be found in any respect untrue in every such case, the policy shall be null and void." The application was made by Richard Price as agent for said Anna, consists of questions addressed to said Richard Price, and his answers thereto, and a stipulation following such questions and answers, and in these answers it is hereby declared, that the above are fair and true answers to the questions, and it is acknowledged and agreed by the underwriter that this application shall form the basis of the contract for insurance, and if the answers are untrue or fraudulent answers, any suppression of facts, or neglect to answer questions on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon."

answers to the questions in the application are representations, and that, and therefore, their untruth (if they are untrue) is material.

\*1871. To appear in 16 Minn. Syllabus by Wm. A. Reporter of Minnesota.

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ter of defense to be pleaded and proved by defendant. *Held*, further, that representations are by the terms of the policy made conclusively material, and that, therefore, their materiality cannot be questioned.

Both parties in this case having offered or introduced all the testimony desired by either, and the case having been rested on both sides without any motion to dismiss, the court was requested by defendant to give to the jury the following instruction, among others, viz.: "That the plaintiffs are not entitled to recover in this action, but the verdict must be for the defendant."

*Held*, that the court might well decline to pass upon the evidence at this stage of the proceedings, and that its refusal to give the instruction under such circumstances would not be error.

The evidence in the case, in part, examined with reference to the point made by defendant that it does not justify the verdict.

The expression, "family physician of the party," as used in one of the interrogatories found in the application, defined to mean in this case, "the physician who usually attends and is consulted by the members of a family in the capacity of physician."

Appeal by defendant from an order of the District Court for Hennepin County denying a motion for a new trial. The case is fully stated in the opinion.

BIGELOW & CLARK, for Appellant.

CORNELL & BRADLEY, for Respondents.

BERRY, J.

This is an action upon a life insurance policy upon the life of Richard D. Price.

By the terms of the policy the defendant promises to pay the sum assured to Anna D. Price, the wife of said Richard, upon whose application and for whose benefit in the first instance the policy was issued.

The policy further provides as follows: "In case of the death of said Anna D. Price before the decease of the said Richard Price, the amount of the said insurance shall be payable to their children, for their use, or to their guardian, if under age, within ninety days after due notice and proof of the death of said assured as aforesaid."

[Concluded in April Number.]

## SCCELLANEOUS DEPARTMENT.

### CASES REPORTED.

t number of the JOURNAL contains a full report of the even insurance cases, besides that of *Hillyard, et al vs. Benefit Ins. Co.*, which is concluded from last number.

*The Franklin Life Ins. Co. vs. Hazzard*, decided in the rt of Indiana, arose upon a life policy, which was sold to the plaintiff by the assured. The assignee had no rest in the life of the assured, but simply bought the id the premium as a speculation. The court adopt the Massachusetts Supreme Court and reject that of New id that no one should hold a policy upon the life of an- se life he had no insurable interest at the time he ac- ily, whether the policy be issued to him directly from r whether he acquired it by purchase and assignment

The judgment of the court below, in favor of the against the company, was reversed.

*The Fireman's Fund Ins. Co.*, was a suit upon a careless tory policy, in which the court was compelled to inter- ing of the contract more by circumstances than the e of the instrument. The insurance was upon a stock ordnance stores, and other merchandise, hazardous and us. It was claimed on trial that the insured had in his me of the fire a kind of fireworks called signal lights, eeping of these articles was contrary to the provisions in relation to specially hazardous articles enumerated in a of risks annexed to the policy, and to such articles as to legal restrictions, and that the policy was rendered eeping of the signal lights. The court held that the in- ot cover such fireworks; that he had no right to keep at the defendant was entitled to have the question as to risk was increased by keeping them submitted to the

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jury. The decision was rendered in the Commission of Appeals of New York.

*The United Life, Fire, and Marine Ins. Co. vs. Foote et al.*, was a suit upon a policy insuring the plaintiff against loss or damage by fire, upon property in a building used as a liquor store. The policy provided that the company should not be liable for any loss or damage occasioned by, or resulting from, any explosion. The insured also carried on the business of rectifying whisky in the building, for which the privilege was granted in the policy. In the process of rectifying, the raw spirits or liquor was converted into vapor in the stills, by means of steam pipes passing through them. One of these stills was accidentally left open; the vapor escaped, mixing with the atmosphere and filling the room, and an explosion was caused by the mixture coming in contact with the burning gas jet, and fire was communicated to the building, by which the insured property was destroyed. The court held that the explosion occasioned the fire which destroyed the property, and that the loss resulted from an explosion within the true intent and meaning of the policy. The judgment of the court below, in favor of the plaintiff and against the company, was reversed. The decision was rendered in the Supreme Court of Ohio.

The case of *The Great Western Ins. Co. vs. Thwing*, decided in the United States Supreme Court, on error from the United States Circuit Court for the District of Massachusetts, arose upon a marine policy, containing a warranty not to load the ship more than her registered tonnage. On the voyage, 238 tons of cannel coal were used for dunnage of the ship; for this a bill of lading was signed; it was placed upon the freight list, and freight was collected. Considering the coal as cargo, there was an excess of 23 tons over the registered tonnage of the ship. The court, dissenting from the decision of the Supreme Court of Massachusetts, in a case between the same parties and under the same policy, 103 Mass., 401, held that although articles used simply as dunnage are not to be regarded as loading; articles for which freight is paid are merchandise, and that merchandise, when used as dunnage, is to be regarded as cargo and a part of the ship's lading. The court reversed the judgment of the Circuit Court, which was in favor of the plaintiff and against the company.

In *Van Valkenberg vs. The Lenox Fire Ins. Co.*, the Commission of Appeals of New York held that, under a provision in the policy that the insurance might be "at any time terminated at the option of the company on giving notice to that effect," and refunding a ratable



the premium ; the company was required to give notice of termination then and there, and by the notice, terminated, the policy would be terminated at some future time ; and that the company, in order to terminate the policy, was bound to seek the insured and tenement, and that the company must be certain that a premium was paid. The company gave notice in November to cancel the policy, but would allow the insured till the next day to secure other insurance. On that day the policy was in the books of the company. On the 30th of December the company paid over the return premium and took a cancellation from the agent of the insured. The property insured was destroyed on the 25th of the same month, which fact was unknown to the company and the agent of the insured at the time the premium was paid and the receipt given. The court decided the company was liable under the policy for the loss, and the judgment of the court below.

*Alexandre et al. vs. The Sun Mutual Ins. Co.*, arose under a fire policy. The question arose upon the construction of the repairing clause in the policy, and the effect of the assent of the underwriter in regard to the making of repairs upon the vessel. The court held that the company was liable, under the clause for a ratable proportion of general average expenses, in putting the vessel into port after the damages were sustained over and above the sum of insurance mentioned in the policy, that the company was only liable for temporary and for the extent of the sum mentioned, and that expenses incurred for the repair of a ship cannot properly be said to be those by which the vessel was put in a condition of seaworthiness. The decision was affirmed by the Commission of Appeals of New York.

*Price, et al. vs. The Phoenix Mutual Life Ins. Co.*, was decided by the Supreme Court of Minnesota. The assured answered questions in the application, that his health was good ; that he was not addicted to the habitual use of spirituous liquors ; that he never had rheumatism ; that during the last seven years he had no severe sickness or disease, and that he had no other infirmities. The company refused to pay the amount of the insurance on the ground that these answers were untrue. Judge Folger, in giving the opinion of the court, draws the distinction between representations and warranties, and held that, in this case, the answers were not warranties but representations, but

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that as representations they were material. There was evidence that the assured, prior to the application, had had sub-acute rheumatism and on trial a physician was asked whether sub-acute rheumatism had any effect to shorten life, and he was permitted to answer, against the defendant's objection. The court held that it was error to receive the question, as the jury might have found their verdict for the plaintiffs on the ground, if they found that sub-acute rheumatism was rheumatism in the meaning of the question, that they had a right to inquire whether the representation made in regard to it was material. The court held, also, that the person who usually attended and was consulted by the wife and children of the assured as a physician would be his family physician in the meaning of the question in the application, although he did not actually attend on, and was not consulted as a physician by the assured himself. On this point Judge McMillan gives a dissenting opinion. A new trial was awarded. The verdict in the court below was for the plaintiffs and against the company. A part only of the opinion in this case is given in this number. The remainder will appear next month.

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PUBLISHERS NOTE.

Pages 229 to 240 inclusive, contained current news matters having no bearing on insurance litigation. They are omitted in this reprint as of no value in a law volume. This note is in explanation of the hiatus in the paging.

## TOPICS.

dived transcripts of de-  
owing cases :

Metropolitan Ins. Co.  
of Appeals of N. Y.  
the Relief Fire Ins. Co.  
S. Supreme Court.  
township vs. Manlove,  
ers and Merchants Ins.

preme Court of Ind.  
Co. vs. Leeds.

preme Court of Ind.  
Indianapolis Ins. Co.  
preme Court of Ind.  
Life Ins. Co. vs. Henry

me Court of Kansas.  
vs. The Republic Fire

Court of Wisconsin.

r obligation to Messrs.  
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s. Co. vs. Hazzard, for  
a transcript of the ac-  
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journalists compels us  
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orations seeking public  
avor. The Washington  
Company ever has been

s give an assurance of  
holders of its policies,  
comment is uttered in  
ement.

unquestioned ; no im-  
discredit of its manage-  
alled for official examin-  
ashington ranks among  
st of our best corpora-

rmation of our readers  
nce, we call their atten-

tion to the Annual Report of the com-  
pany on another page.

—Paul H. Bierman has been appoint-  
ed General Agent of the Washington  
Life Ins. Co. at St. Louis, in place of T.  
D. Kimball, Esq., resigned. Our ac-  
quaintance with Mr. Bierman dates back  
nearly two years, during which time he  
has been actively engaged in the insur-  
ance business. We are glad the com-  
pany have been successful in securing  
so good a man for the position. The  
patrons of the company can feel confi-  
dent that any business intrusted to his  
care will be promptly attended to.

—Mr. J. B. Hall, formerly secretary  
of the Aurora Fire Ins. Co., has been  
elected vice-president of the Home, of  
Columbus.

—We are under obligations to Hon.  
W. C. Webb, Superintendent of the  
Insurance Department of Kansas, for a  
copy of his Report for 1872.

—Hon. David Dudley Field will ac-  
cept our thanks for a copy of the "Out-  
lines of an International Code, Book  
Second."

—The latest development in the Win-  
ston-English affair discloses the former  
suffering with a reputation damaged, at  
a self estimate, to the extent of \$160,-  
000, and the latter a guest of the Lud-  
low-street Jail. The occasion of this  
hospitality and suffering is some twenty-  
three articles in the *Insurance Times*,  
during the last six months, exceedingly  
well calculated, if believed, to convey  
the impression to an innocent reader of  
a remarkable capacity in Mr. Winston  
for so managing the matters of the Mu-  
tual Life as to secure a most desirable  
financial result for himself and friends.  
But Mr. Winston doesn't believe them,  
and he doesn't think innocent readers  
should believe them; in fact, he doesn't

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think Mr. English himself believes them. Mr. English says he does, however, but would like, before attempting to prove it, to catechise Mr. Winston a bit. Accordingly the latter gentleman has been ordered to appear and be examined, touching all sorts of things, public and private, personal and official, recent and of by-gone years. The situation would seem to be English still on the attack and Winston on the defensive. On general grounds the attack is always the easier, and doubly so in this case, as the attacking party has but little to lose, and the defending much to save.

—Ex-Governor English of Connecticut has given \$10,000.00 to the Yale College law school, as a permanent fund for the maintenance of the library. This sum is given with the understanding that a sufficient amount, in addition, shall be raised to complete the court reports to date. This will require about \$16,000.00, half of which has been raised in New Haven. The remainder will be contributed by the alumni and friends of the college elsewhere.

—Judge Downey in his opinion in the case of Mutual Benefit Life Ins. Co. vs. Miller, reported in the last number, when alluding to the law that the statements in an application for life insurance are warranties, upon the truth of which the contract with the company depends, no matter whether a misstatement be unintentional or not, remarks that a person effecting an insurance upon his life cannot be too cautious in ascertaining the real facts alleged in his declaration of application.

—An association of marine underwriters has been formed at Bombay, in British India, composed of twenty-six marine insurance companies, having for its objects the searching out and prevention of frauds on underwriters, and the

prosecution of the guilty parties; supervision of wrecks and affording aid and assistance to the commandants of wrecked vessels; for the establishment of a uniform use and practice in insurance matters; for providing a general library for the use and reference of members; for corresponding and acting in concert with associations of underwriters in other parts.

—The North Missouri Insurance Company presents, through the columns of the *Journal*, a financial exhibit which may well be proud of. Officer and managed by men second to none in financial ability, it has increased its assets from \$94,000 in 1868, to \$740,000 in 1872. Of this great addition, \$96,000 accrued January 1st to July 1st, 1872. Nothing further need be said, unless be that D. McLeod, Esq., is manager of its St. Louis office, where a large share of its business is done.—*St. Louis Journal*.

—The emotional insanity plea has spread to the Indians. One of them the other day, when arrested for killing and scalping some white men, being asked to account for the eccentricity, said, "Me heap crazy. Me too much crazy."

—Since the year 1826 not a single first-class occupied dwelling-house in Boston has been burnt to the ground. This was asserted in the Massachusetts House of Representatives, the other day, on the authority of a leading insurance official.

—The court house at Quebec was destroyed by fire on the 3rd ult. All the records of the Province since its foundation, together with title deeds and other important legal documents, were destroyed.

—Joaquin Miller, the "poet of the Sierras," was once a county judge in Oregon.



THE  
ANCE LAW JOURNAL.

APRIL, 1873.

No. 4.

DIGEST OF DECISIONS

CASES, RENDERED IN THE UNITED STATES SUPREME  
D CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

*from certified transcripts in our possession.*

APPLICATION.

—*Materiality of Statements in—Application and  
dence, Statements of Officers.*—On the trial, in a  
policy of life insurance, the deposition of the presi-  
company was offered in evidence, in which he stated  
was issued by the officers of the company, un-  
that the statements in the application were true,  
ould not have been issued had they known that  
statements were untrue. *Held*, that “where the  
n writing, the law determines what is and what is  
determination which applies to all similar con-

New England Mut. Ins. Co., 98 Mass., 402; Miller vs. Mut.  
Co., 31 Iowa, 232.\*

*Held*, also, that "the contract is based upon the application. The law presumes this and determines the nature and extent of the relation," and that the question as to how far false statements, if any there were in the application, affect the validity of the contract, is a question of law for the court, and not one to be settled by the opinion or judgment of either party. The testimony was immaterial, and properly rejected by the court. *Held*, also, that "each insurance company may determine for itself upon what conditions it will make its contracts. It may make any trivial, unimportant matter into an essential prerequisite condition of the contract, and no person can make any legal complaint because it insists upon such condition, and any legitimate testimony which shows that it made such immaterial matter a condition of or material to its contracts, may be given in evidence."

Valton vs. The National Fund Ins. Co., 20 N. Y., 32.

But if a party would make anything material, other than what the law says is material, it must be made known to the other party prior to the contract. The statements of the president of the company as to what he considered material, and what he would have done had he known certain things, were properly rejected, as such judgment and determination were not communicated to the other party.

*The Washington Life Ins. Co. vs. Haney.\**

Rep'd Jour'l p. 233.

KAR. S. C.

## CONSTRUCTION.

§ 52. LIFE.—*Truthfulness of Statements in Application.*—In the application, under the head "instructions in filling up the application," was the following: "First. Answer each of the questions on the first page to the best of your knowledge and belief, briefly but explicitly," and at the close of the questions and answers of the applicant, and just before her signature was the following: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it

\* Decision rendered January 14th, 1872.

and agreed by the undersigned that the above form the basis of the contract for insurance, and willfully untrue or fraudulent answers, any suppression in regard to the party's health, or neglect to pay on or before the day it becomes due, will render the policy void, and forfeit all payments made thereon." "if the application propounds certain questions, in what manner they must be answered, it is enough answered in that manner, and when the policy is based on the statements and declarations of the application, it is enough made in the manner and under the rules laid down by the company in the application." *Held*, also, that the policy for its validity requires truthfulness in the application, it is enough if they are true according to the degree and conditions of the truthfulness required in the application. This is all the parties meant when they spoke of truthfulness in the policy."

*Life Ins. Co. vs. Haney.*

—§ 51.

—*Of Policy* — "*Explosion*" — "*Explosion and* company, by its policy, insured against loss or damage to stock or merchandise, described as consisting principally of barrels, fixtures, tools, and office furniture, contained in a building used as a liquor store, "with privilege of rectifying and manufacturing fine spirits by steam not generated in the building." The policy contained the following provision: "This policy is not liable for loss or damage by lightning or tornado, or by any fire mentioned or insured against; but will be responsible for loss or damage to property consumed by fire occurring in the building. Nor will this company be responsible for loss or damage to property consumed by fire happening by fire occasioned by any invasion, insurrection, riot or rebellion, or of any military or usurped power, nor where occasioned or superinduced by fraud, dishonesty, or any act of the insured, nor for any loss or damage occasioned by fire resulting from any explosion whatever, whether of gunpowder, camphene, coal oil, gas, nitro-glycerine, or

any explosive article or substance, unless expressly insured against, and special premium paid therefor." At the time taking out the policy, and until the fire, the insured were engaged in rectifying whisky, in the building mentioned in the policy. In the process of rectifying, the raw spirit was conveyed by pipes to the stills where it was converted into vapor by steam passing through them, and from thence the vapor was conducted to a condenser. On the occasion of the fire, a valve in one of the stills was left open, and the vapor escaping into the building mingled with the atmosphere, forming an explosive mixture which came in contact with burning gas jets, and a sudden and violent combustion occurred, accompanied by a report and a gush of flame which was driven through the door of the still-room. Immediately after this the building was discovered to be on fire throughout its several stories. *Held*, that "an explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or accurate measurement, but by the common experience and notions of men in matters of that sort. In this case, although the building was rent asunder, or the property therein broken to pieces, there was a sudden flash of flame, a rush of air, and a report like the 'crack of a gun,' which certainly brings the occurrence within the common meaning of the word as used in many instances." *Held*, also, that the fire, by which the building and stock of merchandise insured were consumed, was occasioned by, and resulted from, an explosion of spirit vapor mixed with atmosphere, and that the explosion was caused by the mixture coming in contact with the burning gas jet; and that the explosion was not caused by a fire within the meaning of the policy. *Held*, also, that the terms of this policy must be taken in their ordinary sense; and we are satisfied that the proofs show according to the ordinary sense and understanding of men in reference to such matters that the explosion occasioned the fire which destroyed the



red ; or, in other words, that the loss resulted from explosion within the true intent and meaning of this

*Life, F. and M. Ins. Co. vs. Foote et al.\**

90.

OHIO, S. C.

—*Of Policy—Explosion and Fire.*—The company sustained loss or damage by fire a stock of merchandise in a building occupied as a liquor store, with the privilege of bottling and manufacturing fine spirits by steam. The policy contained the following provision : " This company is not liable for loss or damage by lightning or tornado, unless expressly insured against ; but will be responsible for loss of property consumed by fire occasioned by lightening. Will this company be responsible for any loss or damage of property consumed by fire, happening by reason of, or by, any invasion, insurrection, riot, or civil commotion, or any military or usurped power, nor where the loss is occasioned or superinduced by fraud, dishonesty, or breach of contract of the insured, nor for any loss or damage resulting from any explosion whatever, whether of gunpowder, camphene, coal oil, gas, nitro-glycerine, or any other article or substance, unless expressly insured against by special premium paid therefor." In the process of distilling the raw spirit was conveyed by pipes to the still, and was converted into vapor by steam pipes passing through them, and from thence the vapor was conducted to the condenser. On the occasion of the fire, a valve in one of the pipes was left open, and the vapor escaping mingled with the fire, and coming in contact with burning gas jets, an explosion followed, and the building was set on fire and destroyed. *Held*, that the terms of the clause " explosion," are comprehensive enough to include both loss—whether loss by the explosive force, or loss by direct combustion.

*Western Ins. Co., Law Reports, 1868 ; 3 Exchequer, 71.*

and September Term, 1873.

ST. M. C. & C. CO. N. Y.

*Held*, also, that "we can find no good reason for doubting that loss and damage by fire, resulting from an explosion, was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause properly construed should read, 'nor any loss or damage by fire occasioned by or resulting from any explosion whatever,' and that no loss or damage occasioned by an explosion of any of these substances named was expressly insured against, nor was any special premium paid for any such special risk." *Held*, also, that "the spirit vapor, having escaped from its confinement and passed into the still-room, where it became mixed with atmosphere so as to form an explosive substance, under circumstances that precluded possibility of reclaiming and utilizing it, was no longer a part of the stock of merchandise insured, and was not under the protection of the policy."

*The United Life, F. and M. Ins. Co. vs. Foote et al.*

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§ 55. FIRE.—*Of Policy*—"Fireworks"—*Hazardous*.—The policy, issued upon a stock of fireworks, ordnance stores, and other merchandise, hazardous and extra hazardous, provided that if the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein any articles, goods, or merchandise, denominated hazardous, extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to the policy, the policy should be void so long as the same should be so used. The policy also provided that whenever gunpowder, or any other article subject to legal restrictions, should be kept in quantities greater than allowed by law, or in a manner different from that prescribed by law, the policy should be void. In the second class of hazards annexed to the policy, under the head of hazardous, was "Firecrackers in packages," and under the head of extra hazardous, "Matches—stocks of, on sale." No articles denominated specially hazardous were mentioned in the second class, but in the third class of hazards annexed to the policy were articles denominated specially hazardous, among which were "Fireworks." An ordinance of the Common Council of the city, in force at the time the policy was issued, provided that no person should there

any fireworks of any kind or description, other than crackers, within the limits of that city, except as in provided." The ordinance further provided that excepting colored pots, and lance wheels, and other brilliant-colored fires, not exceeding in value \$1,000.00, for retailing within the fire limits from the 10th to the 10th day of July of each year, and no longer permission." About a week before the fire occurred, in order to fill an order from a customer, purchased signal lights, such as were in the ordinance called brilliant-colored fires," and a few remained on hand, among the insured goods when the fire occurred. The defendant tried to prove that such goods were constantly kept on hand and that the risk of the fire was not only greatly increased, but that it was originated by these signal lights. The fire occurred on the 26th day of August, and the property was totally destroyed. On the trial in the court below, the court refused to dismiss the plaintiff's complaint, and re-committed to the jury the question, whether or not, by keeping such goods on hand, the risk was increased, and directed a verdict for the plaintiff. *Held*, that "we are not to presume that the defendant insured the plaintiff against loss was intended to make the fire so specially hazardous that he had no right to keep such fireworks, in the sense in which the term was used in the ordinance, as were in the prohibition of such fireworks as were in the ordinance, or that they might by permission be kept for retailing." *Held*, upon the whole case, the defendant was not entitled to a verdict. He was entitled to have the question, whether the risk was increased by keeping the signal lights, submitted to the jury.

*Fireman's Fund Ins. Co.\**

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N. Y. Com. A.

## EVIDENCE.

—*Declarations of the Assured—Application.*—The defendant issued a policy for the benefit of the plaintiff, upon

January Term, 1873.

the life of his wife. It was claimed that answers made her, in the application, in regard to her health, and that of father's family, were untrue. *Held*, that the declarations of party whose life is insured for the benefit of another, made long after the application and the contract, cannot be received in evidence against the assured to impeach the truthfulness of the application.

*Rawls vs. The American Life Ins. Co.*, 36 Barb., 357; *Rawls vs. The American Life Ins. Co.*, 27 N. Y., 282; *The Fraternal Mut. Life Ins. Co. vs. Applegate*, 7 Ohio St., 292.

*The Washington Life Ins. Co. vs. Haney.*

—§ 5

### POLICY.

§ 57. *LIFE.—Construction of—Statements in Application.*—The policy contained the following provisions: "This policy issued and accepted by the assured upon the following expressed conditions and agreements; \* \* \* or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, \* \* \* then, in every such case, the said company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall be null and void." *Held*, that "we do not understand the clause, 'upon the faith of which this policy is issued,' as limiting this condition to a portion of the application or any particular statements therein. It does not mean to imply that there are certain statements which must be true because the policy is based upon them, while others are immaterial. It means that the policy is issued upon the faith of the whole application, with all its statements and declarations, and that if any of them are untrue the policy is avoided."

*The Washington Life Ins. Co. vs. Haney.*

—§ 51.

§ 58. *FIRE.—Construction—Measure of Liability.*—The company issued a policy upon a quantity of high-wines, which were destroyed by fire while on deposit in the distillery warehouse and before the United States tax of fifty cents per gallon had

any order from the government for the withdrawal had been given. The high-wines, without the pay-government tax, were worth forty-nine cents per time they were destroyed. *Held*, that the tax of r gallon was added as a burden upon the consumer, the distiller, and that though a lien for the tax ex-high-wines from the time of distillation, for the pre-fraud, the personal liability of the insured is only l, or breach of the condition of the bond, and that liability of the insurance company was only for the spirits at forty cents per gallon.

*Ins. Co. of New York vs. Farrell.\**

108.

ILL. S. C.

*E.—Termination of—Notice.*—The policy contained g provision: "The insurance may also be at any ted at the option of the company, on giving notice and refunding a ratable proportion of the premium expired term of the policy." In the latter part of No-company gave notice to the plaintiff that they would policy and return him the unearned premium *pro rata* expired time, but would allow him until the 6th of place the insurance elsewhere. On the 6th of e policy was cancelled on the books of the compa-earned premium calculated, amounting to \$24.46, bject to the call of the plaintiff. On the 30th of e plaintiff's agent called at the office of the com-ived the money and signed a cancellation receipt. insured was destroyed by fire on the 25th of De-the fact was unknown to the company and to the ent when the transaction of December 30th took that the conditions for terminating the insurance plied with by the company; that by those condi-pany was required to give notice "that the insur-and there, and by the notice, terminated; not that erminated at some future time." *Held*, also, that the 25th of December "the contingency on which

and January 22nd, 1873.

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the liability was made to depend had occurred, and the company was an absolute debtor to the plaintiff for the amount of the insurance. The negotiations after this time could not relieve the company of its liability. The receipt by the plaintiff in person of \$24.46 in discharge of an indebtedness of \$1,600.00, would not accomplish that result unless accompanied by a technical release under seal."

*Van Valkenberg vs. The Lenox Fire Ins. Co.\**

Rep'd Jour'l p. 205.

N. Y. COM. A.

§ 60. LIFE.—*Assignment of—Insurable Interest—Wager Policy.*—The company issued a policy upon the life of the assured, who paid the first annual premium and afterwards sold and assigned the policy to the appellee, who was not his creditor, and who had no insurable interest in his life. The assignment was assented to by the secretary of the company, subject to the conditions of the policy. The appellee paid the second annual premium, and the assured died after the payment of the premium. *Held*, that "an assignment of a policy of life insurance to one having no interest in the life of the assured, where the assignment is a cover for a speculating risk, is void as contrary to the general policy of the law respecting insurance."

*Stevens vs. Warren*, 101 Mass., 564.

*Held*, also, that the purchase of the policy by the appellee was essentially a wager upon the life of the assured; that the law will not uphold such purchases, and that the appellee acquired no right to the policy or to the sum secured thereby.

*The Franklin Life Ins. Co. vs. Hazzard.†*

Rep'd Jour'l p. 180.

IND. S. C.

## PRACTICE.

§ 61. LIFE.—*Instructions.*—The record failed to show that all the instructions asked on trial in the court below, or all bearing upon the particular points embraced in those refused, were

\* Decision rendered January Term, 1873.

† Decision rendered January 14th, 1873.



*Held*, that it was impossible for the court to say error in refusing to give the instructions refused, have been already given, and those given may be accompanied and qualified by others, so as really to conform exactly as the plaintiff in error insists it should

Chapple, 10 Kansas.

*on Life Ins. Co. vs. Haney.*

—§ 51.

*—Admission of Evidence.*—On the trial in a suit by, the application was set out in full in the answer, and was not denied under oath. The court ordered the application to be stricken out of a deposition introductory of the defendant's evidence. *Held*, that "as the facts set out in the answer, and not denied under oath, were admitted, and to offer the original would have been in the testimony."

*on Life Ins. Co. vs. Haney.*

—§ 51.

### PREMIUM.

*—Refunding Premium—Termination of Policy.*—The policy contained the following provision: "The insurance may be at any time terminated at the option of the company, by giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." The company, in order to terminate the insurance, was required to refund the insured a ratable proportion of the premium. For this purpose the company was bound to seek the insured and pay him the amount. *Held*, also, that it was the duty of the company in making the payment to be certain that the full amount was paid.

*erg vs. The Leno Fire Ins. Co.*

—§ 59.

### TAXATION.

*—Exemption from—Constitutionality of Statute.*—The assessors of St Louis County assessed for the year 1870 the value of bonds and notes of the value of \$294,000.00

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belonging to the appellant, a mutual life insurance company organized under the laws of the State, and having no capital stock. The statute provided that life insurance companies organized under the laws of the State should pay certain fees to go to the support of the insurance department, which should be in lieu of all fees and taxes whatsoever, except that they might be taxed upon their paid-up capital stock. The Constitution of the State, in the declaration of rights, declared that "all property subject to taxation ought to be taxed in proportion to its value," and also provided that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." *Held*, that this law must be construed in subordination to the Constitution of the State, and that the word "ought" is not directory, but mandatory, and is "expressive of a duty and equivalent to a prohibition against proceeding in any other way." *Held* also, that under the Constitution, the Legislature had no power to exempt the company's property from taxation, or to commute the taxes upon the same, and that the act in question cannot have the effect of exempting the appellant's property from taxation.

*City of Zanesville vs. Richards, Auditor, etc.*, 5 Ohio St., 589; *Kneeland vs. City of Milwaukee et al.*, 15 Wis., 454.

*Life Association of America vs. The Board of Assessors of St. Louis County.*

Rep'd Jour'l p. 253.

Mo. S. C.

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\* Decision rendered April , 1872.



## REPORT OF DECISIONS

ED IN INSURANCE CASES, IN THE UNITED STATES  
PREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

SUPREME COURT OF MINNESOTA.

*Appeal from District Court of Hennepin County.*

PRICE AND LIZZIE D. PRICE, BY THEIR  
*ad litem*, ELON DUNBAR, *Respondents*,

*vs.*

MUTUAL LIFE INS. CO., *Appellant*.\*

[Continued from March Number, page 224.]

Price having died before her husband, Richard Price, the  
P. and Dunbar Price, being their minor children, bring  
y said Elon Dunbar, duly appointed their guardian *ad*  
ecute the same. The defendant insists that the action  
been brought by the general guardian of said minors.  
of a different opinion. Admitting that the guardian  
policy is the general guardian, we think that while the  
ble \* \* to their guardian \* \* \* within ninety  
ve the defendant the privilege and make it its duty to  
assured to said guardian, if the children are under age,  
days, it does not follow that an action brought to re-  
assured must be brought in the name of such general

ered 1871. To appear in 16 Minn. Syllabus by Wm. A.  
te Reporter of Minnesota.

guardian. The children are the real parties in interest, and therefore the action is under the statute (ch. 66, Gen. St., §§ 26, 30), which is brought by them in their own names, they *appearing* by a guardian *ad litem*. Even if the general guardian be regarded as a trustee of an express trust, the statute authorizing such trustees to bring actions in their own names, is not imperative, but permissive in its terms. Ch. 66, Gen. St., § 28.

This action was brought in the Hennepin County District Court on November 9th, 1869. The complaint, among other things, alleges that on the 10th day of June, 1867, Anna D. Price, who was then the wife of Richard Price, entered into a contract of insurance with the defendant upon her said husband's life. The complaint sets forth the policy in full. The consideration for the policy is expressed in it to be the representations made to defendant in the application for the policy, and the premium paid and to be paid. The policy contains the following provision: "Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that \* \* \* in case he shall die by the hand of justice, or in consequence of a duel, or of the violation of any law of these States or of the United States, or of any other country which he may be permitted under this policy to visit or reside in, or if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void." The complaint further alleges the death of said Anna, September 28th, 1867, and the death of said Richard, March 2nd, 1869; and "that up to March 2nd, 1869, all the terms, agreements and stipulations of said policy of life insurance, that were to be performed on the part of said assured, had been fully and faithfully performed and complied with;" that proper notices and proofs have been duly made, but the defendant has failed to pay any part of the sum assured. The complaint does not set out the application referred to in the policy, nor state what the "declarations or statements" made in the application and referred to in the policy were.

Defendant's answer admits the making of a contract of insurance with Anna D. Price, and that the policy set out in the complaint contains a part of said contract, but denies that the policy contains the whole contract, and alleges that the application referred to in the policy is part of said contract of insurance.

The answer sets out the application dated June 3rd, 1867, which was made by the said Richard Price as agent for said Anna, and con-



questions addressed to said Richard, and his answers application contains a stipulation following the questions, and in these words, namely: "It is hereby declared above are fair and true answers to the foregoing it is acknowledged and agreed by the undersigned, application shall form the basis of the contract for insurance, any untrue or fraudulent answers, any suppression of fact to pay the premium on or before the day it becomes will render the policy null and void, and forfeit all thereon."

denies that up to the 2nd day of March, 1869, all the contents, and stipulations of the policy that were to be performed by the assured, have been fully and faithfully performed, and charges that the answers to the following questions in the application were untrue, viz.:

What is the present state of the party's health? Answer—

The party addicted to the habitual use of spirituous liquors? Answer—no.

Has the party ever had any of the following diseases, (namely, among others,) gout, rheumatism? Answer—never.

Has the party had, during the last seven years, any severe disease? If so, state the particulars, and the name of the physician, or who was consulted and prescribed? Answer—

and residence of the family physician of the party, or the party has usually employed or consulted. Answer—none."

Further charges: that at the time of the making of the policy and the issuing of the policy, said Richard's health was such that he was in bad health and diseased; that he was in the habitual use of spirituous liquors; that before said Richard had gout and rheumatism; that he had had within the last few years before said times dyspepsia and chronic gastritis, and that he had a family physician.

Before the court and a jury, plaintiffs introduced evidence of the due appointment of the guardian *ad litem*, and of the delivery to defendant of the proof of death, with other certificates required, and also proved by the witness who was boarding in Richard Price's family from September to the summer of 1867; that in the summer of 1867, Price's health was good so far as the witness knew.

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They also proved by Dr. Murphy, one of the defendant's medical examiners, that he knew Richard Price in his lifetime for three or four years; that he made a particular examination of him at the time of his application, and considered him a healthy, sound man at that time, and passed him as a suitable subject for insurance; that he examined him and found no disorder about him. Plaintiffs also proved by Dr. C. G. Goodrich that Price died of typhoid fever, and after offering some other evidence, not here material, rested their case. Defendant thereupon moved to dismiss the action, upon the ground that the complaint does not state, nor the evidence establish, a cause of action.

It is here argued that the court below erred in refusing to grant the motion, because the statements contained in the application and warranties, and therefore conditions precedent to plaintiffs' right of recovery which it is necessary for them to aver and prove.

The plaintiffs claim, on the other hand, that these statements are representations. The point thus presented for our consideration is one of prime importance in this case, not only with reference to the question of pleading and burden of proof, but with reference to the further inquiry whether it is essential to plaintiffs' recovery that the statements mentioned shall be strictly true, or whether the *substantial* truth is sufficient.

So far as the questions presented by the case at bar are concerned it is sufficient to define a *warranty* in insurance to be a *part of the contract* evidenced by the policy, and a binding agreement that the facts stated are strictly true. 1 Phillips on Insurance, 5th Ed., §§ 754, 756; Flanders on Insurance, 204-5.

A *representation* in insurance may, for the purposes of this case, be defined to be a statement in regard to a *material* fact made by the applicant for insurance, to the insurer, with reference to a proposed contract of insurance. 1 Phillips on Insurance, § 524, et seq.

As representations simply, they are not a part of the contract of insurance. Flanders on Insurance, 201, and cases cited; Campbell v. N. E. M. L. I. Co., 98 Mass., 381. And though expressly referred to in the policy so as to become a part of the written contract, they may not become warranties. 1 Phillips on Insurance, §§ 871, 893. And even if it be made by the very terms of the policy, as in the case at bar, an express condition of the contract of insurance that if such representations are found to be untrue, the policy shall be null and void, they do not necessarily lose their character as representations and become warranties, though the effect of such express condition

be them exclusively material. *Campbell vs. N. E. M. L.*

that if representations be *substantially* true, while a warranty strictly complied with. 1 Phillips on Ins., §§ 544, et seq.; *Daniels vs. Hudson R. F. I. Co.*, 12 Cushing, 423; *Cattaraugus Co. M. F. I. Co.*, 18 N. Y., 376. A false warranty, therefore, avoids a policy, while a false representation (not a warranty) does not avoid a policy unless it relates to something material in fact, or is made material by the contract of the policy. 1 Phillips on Ins., § 524 et seq.; *Flanders on Ins.*, 202, 298, et seq.; *Wells vs. Mass. Ins. Co.*, 49 Me., 200; *Campbell vs. N. E. M. L. Ins. Co.*, supra.

are, then, conditions precedent, so that their truth must be proved to the assured, upon whom of course the burden of proof rests; whereas the falsity of representations is matter of fact, to be pleaded and proved by the insurer. *Wilson vs. Hampshire R. I.*, 159; *Campbell vs. N. E. M. L. Ins. Co.*, supra; *Conn. Mu. Ins.*, 100 Mass., 474; *Herron vs. Peoria M. Ins. Co.*, 28 Ill., 238; *Mu. Ben. Ins. Co. vs. Robertson*, 54 Ill., 200; *Gresham L. I. Co.*, 7 Eng. Law and Equity Rep., 100.

Brought together the foregoing principles of the law of insurance, because they all have a direct application to this case, in the view of bringing to mind and placing side by side the consequences which flow from treating statements of warranty under consideration as warranties, or as representations. It is considered that a strict, or, as many of the authorities require, compliance with the terms of a warranty is required, in order to appreciate the force of what is said by Chief Justice in *Daniels vs. Hudson River F. I. Co.*, 12 Cushing, 423. The ruling of all courts is, to hold such a stipulation to be a warranty, rather than a warranty, in all cases, where there is no ambiguity of construction; because such construction will, in general, best effect the real intent and purpose which the parties had in making their contract." And see *Campbell vs. N. E. M. L. Ins. Co.*, supra, and authorities cited. This intent and purpose is to understand it, to enter into a contract of insurance without substantial risk in the given case. And see *Flanders on Ins.*, supra. Hence it is said, too, that "if it be doubtful whether the statements made by the applicant relative to the subject of the policy are to be regarded as warranties, or as representations, they

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will be treated as the latter." *Wilson vs. Conway F. I. Co.*, 4 143.

And we think it is well and truly remarked in 1 Phillips on Ins., § in speaking of the difficulty of determining, in many cases, whether certain phraseology makes a warranty or a representation, that : "cases would have presented fewer difficulties of construction if early jurisprudence had been less open to the admission of forced constructions of the policy, and more easily satisfied with a compliance with written stipulations substantially equivalent to a literal one, where such a construction was not inconsistent with the express provisions of the contract. The recent jurisprudence tends to greater liberality of construction in favor of maintaining the contract. Such a rule may as well be applied to stipulations and recitals in the policy as to representations preliminary and collateral to it; and it is more equitable, after the policy has once gone into effect, and the underwriter has a right to retain the premium, that the contract should be continued in force as long as its being maintained is consistent with its express provisions, and the underwriter is not thereby prejudiced." These remarks apply, as it seems to us, with peculiar force in this State, where equity, which abhors forfeitures, is blended with law in the administration of justice.

We come now to the application of what has been said to the purpose of determining whether the statements referred to in the policy in this instance are to be regarded as warranties or representations; and upon this branch of the case we cannot do better even at the risk of some repetition, than to quote what is said in a comparatively recent case of *Campbell vs. New England Mutual Insurance Co.*, 98 Mass., 381.

It is there said: "When statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy, they do not necessarily become warranties. Their character will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection, or relation to other parts of the instrument. If they are contained in a separate paper, referred to in such a manner as to make it a part of the contract, the same considerations will of course will apply. But if the reference appears to be for a special purpose, and not with a view to import the separate paper into the policy as a part of the contract, the statements it contains will thereby be changed from representations into warranties. \* \* \* In

question whether a statement forming a part of the contract, it must be borne in mind, as an established maxim, that statements are not to be created nor extended by construction. The rule, if at all, is from the fair interpretation and clear import of the words used by the parties. (Authorities cited.) Moreover, from the designation of such statements as 'statements of fact,' or from the form in which they are presented, it appears to be no intention to give them the force of warranties, they will not be so construed. (Authorities

mentioned) and such statements are, in themselves, collateral merely to the contract of insurance. Statements, whether of facts or agreements, belong to the contract of insurance, and are not to be so construed, unless they are so warranted by force of a reference to them in the policy, or by the purpose, manifest in the papers thus connected, that they all form one entire contract." These remarks are made in the case in which the policy was by its express terms made payable on the following conditions," (among others,) that "if the statement made by or on behalf of or with the knowledge of the said assured, or by the company on the basis of or in the negotiations for this policy, shall be found in any respect untrue," then the policy should be void.

In the application in the case cited, the applicant "proposes to introduce evidence in answer to the questions: "Have you carefully read the policy and the answers thereto?" and: "Are you aware of any untrue or untrue answers, or any concealment of fact, or any violation of the terms and conditions of the policy, which will vitiate the policy?" The applicant answered, "Yes."

The court concluded as follows: "The foregoing are full answers to the questions proposed," and was signed by the court. The principal defense was that certain statements made in the application were untrue, and that by reason thereof the policy was null and void.

The court, after attempting—not however as it seems to us with success—to distinguish the case under consideration from the case of *Connecticut Insurance Co., 3 Gray, 580*, in substantial respects as follows: "The defendant however contends that the application having been made in this case, which by its own terms the statements therein contained to be made 'as the ba-

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sis of' the insurance applied for, the policy will attach to that application as containing the 'statements' referred to, and thus constitute an express warranty. \* \* But even if the application may properly be resorted to for aid in the construction, it contains no agreement or words to indicate that its statements are to be taken as warranties, nor that they are to form part of the contract. The designation 'statements,' both in the application and in the policy, comports with the idea of representations rather than of warranties. Representations are 'the basis of' the contract of insurance; and such 'statements' are declared to be. The effect which is to result from their untruth results also from the untruth of representations. It is true that misrepresentations defeat a policy without any provision for that effect in the policy itself. But the insertion of such a provision does not therefore require a construction which shall give them a different force or character. \* \* \* The clause in the policy is in the form of a condition, and is grouped with other provisions of various character and purpose under the general head of 'conditions.' But the use of the term 'conditions' does not always carry the legal consequences which attach to that word in its technical meaning. This clause must be taken as a part of the contract, and must have the same interpretation as an application as its fair interpretation, with the other parts of the contract, requires; but neither the form, nor the subject-matter, nor its associate provisions under the head of 'conditions,' indicates that it was intended to give to this clause the technical character of a warranty, or a condition precedent. \* \* \* By statements 'in any respect untrue' must be intended statements made and received as inducements to the contract; that is, material and proper to be disclosed to the insurers to enable them to estimate the risk proposed, and determine upon the propriety of entering into the contract."

It was held in the case cited, that the statements made in the application were not warranties, but representations only; that the burden of proving them to be untrue was upon the insurers; that they need not be complied with literally, but must be substantially true; that where the question of the materiality of the representations depends upon circumstances, and not upon the construction of the writing, the question is one of fact to be determined by the jury, but that where the representations are in writing, their interpretation belongs to the court, "and the parties may by the frame and content of the papers, either by putting representations as to the quality of the subject insured into the form of answers to specific questions, or by the mode of referring to them in



for themselves that they shall be deemed material; and if done so, the applicant for insurance cannot afterwards show that a fact which the parties have thus stated to be truly stated to the insurers, was in fact immaterial, thereby escape from the consequences of making a false statement a question." The court after citing numerous authorities in support of these positions, and among others, *Anderson v. Phoenix Mutual Life Ins. Co.*, 4 H. L. Cases, 484, (24 Eng. Law and Eq., 1,) held that before it, upon the facts before stated in reference to the policy and application, and to the answers made to the questions put in the application, the parties had by their representations (designated as statements in the application) to be disclosed; and that the only question for the court was whether the representations were in fact untrue. The sum and substance of all this would be that the effect of the condition is to require that the statements be true as *material representations*, not as *warranties*; and that they must be materially and substantially true, and not be strictly or literally true. We barely suggest the very fact that the word true as applied to insurance contracts, would lead to the same conclusion when taken in the familiar rule by which an instrument is construed against its maker, which in the case of the present defendant. See also *Miller vs. Mut. Ben. L. I. Co.*, 1871;)\* *Mut. Ben. L. I. Co. vs. Wise*, Md. Court of Appeals. We have drawn at length upon the case of *Campbell vs. Phoenix Mutual Life Ins. Co.*, because it seems to us to square in all material points with the case at bar, so far as the questions now being concerned.

In the application in the case at bar, it is nowhere said, in the application does or shall form part of the policy, though it may seem to us to possess an importance so decisive as in some of the adjudged cases.

The question in this case is headed: "Questions to be answered in the case of whose life is proposed to be insured, and which form part of the contract." The concluding question and answer in the case are these: "Is the party and the applicant aware of any material or fraudulent answers to the above queries, or any other facts in regard to the health, habits, or circumstances

\* *100* *Mass.*, p. 430.

\* *100* *Mass.*, p. 747.

of the party to be assured, will vitiate the policy and forfeit all payments thereon? Fully." The application then proceeds as follows: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned, that this application shall *form the basis* of the contract of insurance, and that any untrue or fraudulent answers, and suppression of facts, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments thereon."

The application is signed as before stated, and contains no further statements important to be here referred to.

The policy purports by its terms to be made by the company, "in consideration of the *representations* made to them in the application for this policy," and of the premiums paid and to be paid. The proviso contained therein is as follows: "Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that \* \* \* if any of the *declarations or statements* made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, the policy shall be null and void;" and the policy contains nothing further of importance here.

Now upon comparing the application and policy in this case (p. 10) with the above extracts from which we have italicized for convenience) with the application and policy in *Campbell vs. N. E. L. Ins. Co.*, we are unable to perceive that they differ in any respect material to the question under consideration. It seems to us clear that a careful comparison of the language used in the two cases will lead to this result, that we deem it superfluous to attempt to establish it by argument. We will therefore content ourselves with calling attention to a single point of verbal difference. In the case cited, the condition is that "if the statements made \* \* \* shall be found to be the basis of or in the negotiations for this contract shall be found in any respect untrue," etc. In the case at bar, the condition is "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue," etc. With the here unimportant difference that in the first case the statements referred to are not confined to those made in the written application, it seems to us that the "conditions" are substantially identical. The words, "as the basis of \* \* \* the contract," and the words, "upon the faith of which this policy

in the connection in which the same are used, appear the same idea.

ments were the *basis* of the contract, the policy was is-  
with of them, and *vice versa*. The words, "in the ne-  
do not of course affect our present comparison. But  
the authority of the case from which we have so  
we may well pause to inquire why, if it was the in-  
the statements contained in the policy warranties,  
was not distinctly expressed? All doubt could have  
by a few words, by far less words than are now used  
reference to this matter. Why, then, were they not  
*ies*, rather than "representations," "declarations,"  
unless the understanding was that they were the latter  
former? Our conclusion, then, upon this branch of the  
e statements referred to in the policy are not warran-  
entations, and that, therefore, their untruth is matter  
be pleaded and proved by the defendant. It follows  
s motion to dismiss the action, because plaintiffs had  
or prove a cause of action, was properly denied.

aware that it would be difficult, if not impossible, to  
ews expressed in the case cited from 98 Mass., which  
e main, with the doctrines laid down in a great num-  
es.

mined all the authorities cited by defendant, and very  
ome of them, as perhaps *Cazenove vs. British Pro.*  
L., 437, together with *Anderson vs. Fitzgerald supra*  
vs) would not, if their authority was confined to the  
conflict with the case from 98 Mass.; while others  
e irreconcilable with it, or if they could be reconciled,  
what appear to us to be distinctions without differ-

ceive of no useful purpose which would be subserved  
examination of the multitude of cases bearing upon  
uffice it to say that the views to which we have ar-  
result of pains-taking examination, and are such as  
elves to our best judgment. This disposes of the de-  
ssignment of error.

o dismiss having been denied, the trial proceeded, and  
ng rested the case upon its part, plaintiffs introduced  
ttal. Defendant contends that the court below erred,

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secondly, in the admission of evidence under the following circumstances. The 13th question and answer in the application were: "Has the party ever had any of the following diseases, naming several, and among others, rheumatism? Answer—never." Testimony having been introduced going to show that prior to the application the life insured had sub-acute rheumatism, one of plaintiffs' witnesses, a physician, was asked: "Has sub-acute rheumatism any effect to shorten life?" The question, with another of a similar character, was permitted to be answered, against defendant's objection. The only object of this evidence, so far as we can judge, must have been to show that sub-acute rheumatism did not shorten life, as a basis for inferring that it did not enhance the risk, and was, therefore, not material to be disclosed to the insurer. If sub-acute rheumatism was the disease of rheumatism within the meaning of the 13th question, the evidence was entirely inadmissible, since, as we have already seen, it had been conclusively settled by the contract of the parties that the answer to the 13th question was a material representation. *Geach vs. Ingall*, 14 Mees. & Wels., 95. It necessarily follows that the question of materiality was not open, or, in other words, that the plaintiffs could not be permitted to show that the representation was *not* material. If, on the other hand, sub-acute rheumatism was not the disease of rheumatism within the meaning of the question, as to which neither the witnesses nor the counsel agree, it might perhaps be claimed that the testimony as objected to was unimportant, and worked no harm to defendant. But if the case turned, as it may have done, upon the representations contained in the answer to the 13th question, it is impossible for us to say whether the jury found for the plaintiffs upon the ground that sub-acute rheumatism was not the disease of rheumatism within the intendment of the question, or upon the ground that if it was such disease they had the right to inquire whether the representation made in regard to it was material. We cannot say, then, that the evidence was not prejudicial to the defendant; its reception was therefore error.

This brings us to the points made by defendant in reference to the instructions requested and refused to be given, and the charge given to the jury. The court instructed the jury that "upon the issues made by the pleadings, upon the falsity of the statements and representations contained in the application in question, the burden of proof was upon the defendant in respect to the affirmative matter set up by the defendant in its answer to defeat a recovery in this action,"

fore given it is apparent that defendant has no cause for this instruction.

Also instructed the jury "with reference to the issue of the 13th question, and the answer thereto in said application of said Price, prior to the making of said application, the affections mentioned in said question, but of so trifling as hardly to be classed among diseases, and as not noticed at the time of the application, it might not be a cause so as to have an influence upon the length of life in making the application, or such as would be noticed by an examiner as disease, and in that case the answer to said question not be a misrepresentation under a fair and reasonable opinion; that this was, however, a question for the jury to decide on the evidence in connection with the medical testimony. The jury were the exclusive judges of the facts."

It is confessed that this instruction is not altogether clear or

statements contained in the answer to the 13th question have already seen, made conclusively material by the effect of the parties.

Insured had not had the *diseases* mentioned in the question which he might have had, no matter how near they now closely resembling or approximating the diseases would make his negative answer to the question a material misrepresentation.

Insured had any affection amounting to a *disease* of the kind which his negative answer would be a material misrepresentation. How "trifling" the character of the affection, nor how long it was remembered at the time of the application, nor how long it would have any influence on the length of his life, nor how long it would be noticed by the medical examiner; and if there was any amounting to such disease, the question of the materiality of the negative representation would not be open to the jury. The instruction would appear to indicate. *Geach vs. Ingall*, where the court was therefore of opinion that defendant's exception to the instruction was well taken.

On defendant's requests, defendant asked the court to instruct the jury that the plaintiffs are not entitled to recover in this action, but that the case should be for the defendant."

The court's refusal was refused. Defendant also insists, as was in-

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sisted upon the motion for a new trial below, that the verdict was not justified by the evidence. Defendant claims that the court below erred in refusing the instruction asked, and in denying the motion based upon the ground just mentioned, for a new trial; and as both alleged errors are predicated upon substantially the same considerations, we will examine them together.

First premising, however, with regard to the refusal of the instruction, that it was in effect a request that the court should take the place of the jury, and render a verdict upon the questions of fact involved in the issues. Now, of course, there are cases in which, there being no evidence to sustain the plaintiff's alleged cause of action, it is proper enough for the court to direct the jury in terms to find for the defendant. But it seems to us that it would hardly be error for the court to refuse to give such instruction, when the request is made under circumstances like those presented in this instance. Both parties in this case appear to have introduced or offered all the testimony desired by either, and the testimony having been closed, the case had been rested on both sides. The record shows that without the interposition of a motion to dismiss, the court was "thereupon requested by the defendant to give ten instructions, of which that under consideration was the first. Under these circumstances we think the court might well decline to pass upon the effect of the testimony at this stage of the proceedings.

The jury being the judges of the facts, according to the charge subsequently given, and the testimony being all before them, and the case having, as it is to be presumed, been argued to the jury, the court might, in the exercise of a sound discretion, very properly decline to consider at this time, and upon a sudden, the questions presented by the defendant's request, and to keep the jury and the other business of the court waiting meanwhile.

The jury were competent to pass upon these questions, and if the fact should be, as claimed in this case, that the verdict was not justified by the evidence, the defendant could easily take advantage of it as it did, upon a motion for a new trial. Except, however, for the purpose of forestalling wrong influences, and with reference to a new trial, these remarks are not of any great practical importance in this case, since, as before suggested, the same questions upon the merits are presented by the refusal to give the instruction requested, and by the refusal to grant the new trial. The defendant insists that the court below erred in both refusals, because the uncontradicted and

evidence showed that the answers to the 13th, 18th, questions in the application were untrue. The 13th question was: "Has the party ever had any of the following diseases, namely, rheumatism, and among others, rheumatism?" "Answer—never." The evidence in this case tending to show that the life insured had acute rheumatism. There was also evidence in the case showing that sub-acute rheumatism is not the *disease* of rheumatism in the ordinary understanding of the term. There was also evidence tending to show that, technically, and in medical parlance, rheumatism is the disease of rheumatism. Dr. Willey testified that rheumatism is generally overlooked as a disease, and there is other evidence to the same effect.

Rheumatism referred to in the question is the *disease* of rheumatism, a rheumatic affection not amounting to the *disease* of rheumatism. It is not comprehended in its terms, any more than the blood occasioned by a wound of the tongue, or the expectoration of blood, is the *disease* of "spitting of blood," mentioned in the question. The life insured had the right to answer the question on the basis that its terms were used in their ordinary meaning.

It there was any ambiguity in the question so that its meaning was capable of being construed in an ordinary, as well as in a technical sense, the defendant can take no advantage from such ambiguity. See *Wilson vs. Hampden F. I. Co.*, 4 R. I., 169; *Flanders vs. Phoenix Mutual Life Ins. Co.*, 225. As to this question, then, we cannot say that the question was not supported by the evidence.

The question and answer were as follows: "Has the party ever, within the last seven years, any severe sickness or disease?" The charge in the answer was that the life insured had, within seven years *chronic gastritis*. There was evidence showing that he had had gastritis. Unless chronic gastritis and rheumatism are synonymous, as to which there is no judicial precedent testimony, the evidence was not within the issues, so that the representation charged was not proved. In addition, the evidence shows that the life insured was not free from doubt as to whether gastritis was a "severe sickness or disease." We can take cognizance of its character. The evidence certainly has the tendency to show that it was the result of the excessive use of alcohol, and that it was an affection of brief duration.

We cannot say that the jury might not upon the evidence find a verdict regarding it as a temporary consequence of dissipation,

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rather than a "severe sickness or disease," in the ordinary meaning of those terms.

As to this question, then, we are unable to say that the evidence did not justify the verdict.

It remains to consider the 25th question and answer, which are as follows, viz.: "Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted? Answer—have none." This answer is, in our opinion, a positive denial that the life insured had a family physician.

The phrase "family physician" is in common use, and has not, so far as we are aware, any technical signification. As used in this instance, and for the purposes of the testimony appearing in this case, the chief justice and myself are of opinion that it may be sufficiently defined as signifying the physician who usually attends, and is consulted by the members of a family in the capacity of a physician.

We employ the word "usually," both because we do not deem it necessary to constitute a person a family physician, as the phrase is used in this instance, that he should invariably attend, and be consulted by the members of a family in the capacity of physician, and because we do not deem it necessary that he should attend, and be consulted as such physician by each and all of the members of a family. For instance, the testimony in this case shows that at the time when the application for insurance was made, the family of Richard Price consisted of himself, his wife, and two or three children. We think that a person who usually attended, and was consulted by the wife and children of Richard Price as a physician, would be the family physician of Richard Price in the meaning of the above 25th interrogatory, although he did not usually attend on, and was not usually consulted as a physician by Richard Price himself.

We had intended to go farther, and express an opinion distinctly and directly upon the question whether the verdict so far as the matter of family physician is concerned is justified by the evidence, but as the case will go back for a new trial on other grounds, and as we desire to avoid all unnecessary interference with the action of a future jury, we shall rest content with having given our construction of the meaning of the expression, "family physician," as used in the interrogatory under consideration, and with the further remark that, as we have already determined, the answer to the interrogatory is made conclusively material by the policy, so that if false, its false-

ear any recovery upon the part of the plaintiffs in this

other branch of the 25th interrogatory, viz.: that which name and residence of a physician whom the party has employed and consulted, we are all agreed that no proper is by the pleadings as to the truthfulness of the answer to did we have, therefore, seen no occasion to inquire into its whether, so far as it is concerned, the verdict is justified

giving a new trial reversed and a new trial awarded.

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MCMILLAN, J.

ty-fifth interrogatory and answer in the application upon policy is based, are as follows, to wit: "Name and resi- family physician of the party, or of one whom the party employed or consulted? Answer—have none." and of defense set up is that, at the time the application and the policy executed, Richard Price, the deceased, had physician. No other issue is taken upon this interrogato- not appear that the term family physician has any tech- cation; it is, therefore, for the court to determine the the phrase "family physician of the party" as here purpose of the interrogatory was to obtain the name e of the medical attendant best able to give an account ical condition, at the times referred to, of the person was assured. (Bliss on Life Ins., 171.) This intention st effected by obtaining a reference to the physician who ical adviser of such person. The interrogatory, it seems made to embrace the two questions contained in it, and ternative, in order that a true affirmative answer to either the address of the physician who had charge of the as- s medical adviser. In both questions the inquiry is for n of *the party*; yet if the phrase "family physician " does not necessarily include the person assured, a true any cases, may be given to the first question embraced in tory without disclosing the name of the physician of the instance, the person whose life is assured may have one is individual physician, and a different person as the phy- l the rest of his family; yet if the construction given by

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my brethren to the phrase "family physician of the party" be correct, it seems to me he might, in answer to the inquiry for his family physician, truthfully give the name of the physician attending other members of his family, and withhold the name of his personal physician, for according to this construction the terms of the question call for nothing more. It may be that such answer would be a true answer to the entire interrogatory, but that is not the question before us; the only point for us to determine is whether Price's answer is false in this, that he had a family physician at that time, and answered that he had none.

I am unable, therefore, to concur with my brethren in the construction they give to the phrase "family physician of the party." I think the phrase, as used in this instance, means the physician who usually attends and is consulted by all or most of the members of the family of the person whose life is assured, and that the person thus assured, if he has medical attendance, must be one of the members attended by such physician.

Upon all the other points considered in the opinion, and in the conclusion arrived at in the case, I concur.

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## SUPREME COURT OF WISCONSIN,

JUNE TERM, 1872.

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*Appeal from Winnebago Circuit Court.*

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SIDNEY MCBRIDE *et al.*, Respondents,

vs.

THE REPUBLIC FIRE INS. CO., Appellant.\*

1. Where the application for a policy of insurance against fire is filled out by the insurance company's agent, and contains erroneous statements, (in the

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\* Decision rendered . . . 26th, 1872. Syllabus by O. M. Conover, Esq., State Reporter of Wisconsin.

g to the title to the land on which the property insured was may be shown by parol that the agent inserted such statement being correctly informed by the applicant; and in such case will not be avoided by the error. *Miner vs. Phoenix Ins. Co.*, followed.

applicant, being required to state whether there was any danger to the property threatened or to be apprehended, stated that there was none, this would avoid the policy if there was such danger reasonably to be apprehended, and known to the applicant, and stated by him to the agent.

Danger must be real and substantial; one which necessarily ensues, and which a man of ordinary prudence would regard, and not idle talk or reports which might properly be disregarded as

general agent of the insurance company, after examining upon the circumstances attending the loss, told plaintiffs that he could not send the company to pay the loss (for certain reasons), this was no liability on the part of the company, and a waiver of its right to the usual "proofs of loss."

that the legal title to the land on which the property was insured in the insured before he made the application, as was stated in making such application, evidence in behalf of the company that it not fulfilled his contract with his vendor in respect to purchase money, was entirely irrelevant.

COLE, J.

Case in this case rested mainly upon two grounds: first, that the written application made by the plaintiffs they falsely represented that they were the owners in fee simple of the property upon which the store building was situated, whereas in fact it was not in them; and secondly, that they further represented in their application that there was no incendiary danger to the property threatened or to be apprehended, while the plaintiffs well knew that certain person, whose name is given in the answer, had threatened and declared that she would burn the store and contents, and that there was such a breach of warranty in these two statements as would preclude a recovery on the policy. The fact that it was to be questioned that the application was filled up by the agent, who was the agent of the company, and solicited the policy, was stated in the application that the plaintiffs were the owners of the real estate upon which the store was situated.

The company, however, offered in evidence a warranty deed to the store, dated January 7th, 1868, showing that the title to the property was in him, and not in the plaintiffs jointly. But the plaintiff, who was permitted to testify, against the objection of the defendant, that he stated to the agent, McMullen, when the application was filled out, the arrangement between him and his co-plaintiff, that he stated to the agent, McMullen, when the application was filled out, the arrangement between him and his co-plaintiff, to the title to the real estate, and says: "I told him I would get it through McBride, who furnished the store and the

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lot it stood on, and the capital, also, and I was to have half; contract was for three years, and I told McMullen what the contract was." And, as bearing upon this part of the defense, the court in its charge, directed the jury, in substance, that if the plaintiffs showed that the agent who made out the application the truth in regard to the title as it then was, but the agent, without their knowledge, inserted in the application that they were the owners in fee, then a recovery could be had, notwithstanding this misrepresentation in respect to the title. This portion of the charge was excepted to by the defendant. As this exception involves substantially the objection taken to the admission of the evidence above referred to, as well as the exceptions taken to the refusal of the court to give the first two special instructions asked on the part of the defendant, these various exceptions will be considered together. We are inclined to hold that the testimony of the witness Faulkner was properly admitted. Its direct and manifest tendency was, of course, to prove that the plaintiffs formed the agent who filled up the application, the precise truth in regard to the title to the real estate, and that such agent, without their knowledge, either through mistake or intentionally, stated that the legal title was in them jointly, when in fact it was in McBride for the use and benefit of the firm. The evidence was intended to show that there was a mistake in the written application upon that point, but that this mistake occurred through the carelessness or fraud of the company's agent. It may be said that the plaintiffs had no right to trust the agent to write out their answers to the questions in the application, and that if they saw fit to do so, and made a mistake, they are responsible for it, and must take the consequences of the misrepresentation in regard to the title. This view of the law was most emphatically disapproved by the Circuit Judge in his charge to the jury, and we fully concur in his opinion upon that subject. These agents are traveling through the country, soliciting applications for insurance. They frequently have occasion to deal with men unacquainted with the business of insurance, who, from the necessity of the case, rely, and have the right to rely, upon the superior skill and experience of the agent in filling up applications. And if the applicant states truly all the facts in respect to the title and his insurable interest in the property, and the agent inserts an incorrect answer in the application, either intentionally or otherwise, there is no reason for holding that the assured is bound by it. In such a case the mistake of the agent is the mistake of the company itself, and the assured is not estopped from showing the falsity

ment contained in the application. This doctrine is recognized and enforced in a number of cases which before this court. *Miner vs. The Phoenix Ins. Co.*, 27 and the authorities there cited.

charge of the court the jury must have found that the defendant made no representation in regard to the title of land on which the fire was situated which was untrue, and that McMullen, through negligence or carelessness, failed to insert the correct answers in the application, and this mistake or fraud could be shown by parol evidence. The charge of the court upon that point is fully sustained in the *Miner* case.

As to the other ground of defense, the court charged the jury that there was any incendiary danger fairly and reasonably to be apprehended, which was known to the plaintiffs, it was their duty to disclose the same in the application, and inform the agent of it, and that if they failed to do so falsely in that regard, and a loss ensued, this would render the company from liability. It is true, the court added that the danger must be real and substantial—one that increased the risk, and one which a man of ordinary prudence would regard, and not mere idle talk or reports, and that, if he knew about them, might be excused from disclosing them to the agent. The rumor about the threats made by the defendant in the answer was obviously of the latter character, and the plaintiffs might well have disregarded as mere

rumors, it is believed, sufficiently dispose of all questions arising from the two principal grounds of defense set up in the answer.

The defendant further insists that there were no proper proofs required by the policy.

It is shown that soon after the loss the agents of the company came to the place where the plaintiffs reside, to examine into the matter. The plaintiffs state that the general agent, Beveridge, told them at the time that he came to take proofs of loss. This was doubtless as provided for in the policy, and was not what is technically called the proofs of loss which the assured is usually bound to furnish. It appears, however, that the general agent, after having ascertained the facts relative to the fire and the amount of proper compensation, recommended to the plaintiffs that they should not sue the company, as it appeared from their statements that they had sold

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more goods than they had purchased. In other words, the agent after the examination stated to them that "they had no claim under the policy," thus denying all liability on the part of the company to pay the loss. This the court held to be a waiver by the company of the right to demand formal proofs of loss; and the authorities sustain the rule laid down in the charge upon this point. "Production of proofs under such circumstances was of no importance to either party, and the law rarely, if ever, requires the observance of idle formality, especially after the party, for whose benefit the original stipulation was made, has rendered conformity thereto unnecessary and practically superfluous." *Norwich and New York Trans. vs. Western Mass. Ins. Co.*, 34 Conn., 561-570, and authorities cited. And for a like reason, all necessity for producing the certificate of the magistrate was obviated by the position of the company that it was not liable for the loss. That the defendant denied its liability, was a fact sworn to by the agents themselves who made the examination into the circumstances of the loss, and who told the plaintiffs that they had no claim under the policy. There was, therefore, no question of fact for the jury to pass upon, but merely a question of law whether, upon the facts admitted, the company had not waived the conditions in the policy.

The offer on the part of the defendant to prove by the witness Delano the terms of the contract for the sale of the property on which the store building stood, made by him with the plaintiff McBride, was clearly irrelevant to the issues and was properly excluded from the consideration of the jury. The deed was in evidence which showed that some months before the policy was issued the property was conveyed to McBride, who doubtless held the legal title, as we have before observed, for the benefit of the firm. Whether McBride had complied with the conditions of the contract made by him with the witness Delano, was entirely immaterial.

Upon the whole record we think the judgment of the Circuit Court is correct, and that it must be affirmed.

*By the Court.*—Judgment affirmed.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF ILLINOIS,

JANUARY TERM, 1873.

TOOLEY, ADMINISTRATOR OF THE ESTATE OF  
TOOLEY, Plaintiff,

vs.

PASSENGER ASSURANCE CO., OF HART-  
ford, Defendant.\*

issued two policies to the assured, by each of which it agreed  
to pay, in case of his death within two days from the date there-  
of, the sum of \$10,000, provided always that the policies shall  
only extend to bodily injuries, fatal or non-fatal, as-  
sured accidentally received by the assured while actually travel-  
ing in a conveyance, provided by common carriers for the trans-  
portation of passengers in the United States or the Dominion of Canada, and  
in accordance with all rules and regulations of such carriers, and not neg-  
ligence on the part of the assured or of the carrier, or of the  
negligence of the assured in not using due diligence for self-protection."

After obtaining the policies the assured took the railway  
car to Chicago and proceeded to Kankakee, where the train arrived  
at 7 o'clock in the evening. After stopping at the station several  
minutes for taking in water, the bell was rung; the conductor signaled  
the train to start, and the train passed slowly to the coal-bin to take in coal,  
as was the practice, provided the entire train went beyond Kankakee.

When the train stopped at the station, the assured with others left the cars,  
and started, he walked rapidly from the door of the station-house,  
standing on the platform, going along the platform beside the train, and  
toward the platform of the rear car, until he reached the train, when he  
attempted to grasp the car rails, and slipping, fell in front of the  
train, which passed over him and he was killed. There was evidence  
that the train terminated at Kankakee; that when the train was start-  
ing, he remarked that the bell was ringing, and that a person near  
the station called out to him as he was hurrying to the cars that the  
train was going to coal up, and that he turned round as if he heard

that the train terminated at Kankakee, the company is not  
liable; but the liability of the company extended to injuries re-  
sulting from the assured necessarily getting on or off the train as a traveler

that the train terminated at Kankakee, the company is not  
liable for the attempt of the assured to get on the train as he did was at

January 29th, 1873.

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The clause in the policy only required that the assured should make himself acquainted with those general rules, as to the management of trains and the conduct of railroads, which are presumed to be known to travelers under these circumstances. He was not required to become acquainted with every minute rule which might be prescribed on the back of a time card.

It was the duty of the assured to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed. Whether the assured, in attempting to get upon the train, used such a degree of caution and diligence is a question for the jury.

The fact that the assured, when required to state his residence, as a memorandum on the policy, gave Topeka, Kansas, instead of Nokomis, Illinois, which was his place of residence, is not material further than it may have a bearing upon his journey.

The policies required notice, in case of loss or damage, but contained no provision in regard to proofs of loss or damage, or the time within which payment would be made. It was the duty of the company to pay within a reasonable time after notice, and interest would run from the expiration of that time.

B. D. LEE, AND E. PEACOCK, AND MORRISON & PATTON,  
*Plaintiff.*

STEWART, EDWARDS & BROWN, *for Defendant.*

DRUMMOND, C. J.

GENTLEMEN OF THE JURY: This is an action brought by the administrator of the estate of John Tooley, to recover from the defendant the sum of six thousand dollars and interest, claimed to be due on policies of insurance.

There are some general facts which are not controverted. John Tooley, on the 24th day of January, 1871, took from the agent of the defendant at Quincy, Illinois, two policies of insurance for three thousand dollars each; that amount was to be paid on each policy in case of the death of Tooley within two days. It was provided that the liability should not exist unless while he was actually traveling on a public conveyance of common carriers, and in compliance with their rules and regulations; and besides, he was not to neglect the exercise of due diligence for self-protection.

Tooley, on the afternoon of the 25th of January, took the Chicago & North Western passenger accommodation train at Chicago, and proceeded to Kankakee where the train arrived shortly after seven o'clock. It seems to have been the practice was for the train to stop at the station, and then pass on to the coal-bin, *provided* they took the entire train beyond Kankakee. Accordingly, on this evening the train stopped at the station, and several persons left the cars, Tooley among others. The train remained at the station several minutes, and took in water. The bell was then rung, the conductor signaled with his light, and the train went on to take in coal. There was a platform extending from the station-house alongside of the railroad track, toward the water-tank and coal-bin.

... moved on, Tooley, who was standing by a door of the train, started forward on this platform to overtake the train. When he reached the train, he extended his hands to grasp the car between the two passenger cars, the train consisting of a baggage car, and two passenger cars. A car was struck, and he was killed.

The question is, what was the measure of responsibility of the carrier under these policies of insurance? The language of the policy provided always that this insurance shall only extend to accidents, fatal or non-fatal, as aforesaid, when accidentally re-insured, while actually traveling in a public conveyance operated by common carriers for the transporting of passengers in the United States or the Dominion of Canada, and in compliance with the laws and regulations of such carriers; and not neglecting to take proper care for self-protection."

The only conditions material to be considered in the case are these: Tooley must have been actually a traveler in the train; but it cannot be said that the responsibility of the carrier terminated when he stepped out of the car to alight at a station, and became operative again until his foot entered the car to re-embark. That would be giving too narrow a measuring to the policy. We think that the fair construction of the policy is that the responsibility of the carrier terminated by the defendant in this respect was, that it included the responsibility of the carrier while necessarily getting on or off the train.

And it is a question of fact, to be determined by the jury, whether Tooley, at the very time that the injury was received by him, was on the train? And this will depend upon the fact, whether his journey terminated at Kankakee. It is claimed on the one side that that was the termination of his journey; and if so, he was not a traveler on this train at the time of the acci-

... your attention to some of the facts having a bearing on the case.

The conductor states in his evidence that when he issued the tickets of the passengers, Tooley's ticket was only for a journey to Kankakee. That is a fact proper to be considered by the jury, in determining whether or not his journey extended beyond Kankakee. It is conclusive, of course, because, as a matter of experience, when men commence a journey, they do not always expect it to terminate at the termination of the journey, and various circumstances may happen during the progress of a journey which

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change the purpose of the traveler. He may start with the intention of only proceeding to a certain point. During the journey he may change his mind, and proceed further on. There are many reasons to which it is unnecessary to call your attention, which indicate that this is only one incident having a bearing upon the main fact of the case, whether or not his journey terminated at Kankakee.

Mr. Merwin states in his evidence—the truth of which is a matter for the jury—that in a conversation he had with Tooley, he stated that he intended, or expected, to go to Mattoon, which was south of Champaign, where the train stopped. The way that arose was that it was in relation to the seats; he wanted two seats, as he said that he could sleep, as he “thought or expected to go to Mattoon.”

Now, as qualifying this, perhaps, and to some extent inconsistent with the statement of Merwin, is that of the conductor. The conductor says that twice, just before they arrived at Kankakee, he went up to Tooley, and told him that the next station was Kankakee; there was no remark made by him intimating in any way that he intended to go further than Kankakee, and therefore it was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question, whether his journey terminated at Kankakee, and how far it may affect the statement of Merwin. There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. That is claimed to be conclusive evidence of his purpose to proceed further. It is for you to say how much bearing that may have upon this particular question that we are now considering. Then, again, in relation to whether or not he had baggage with him. It is said that there was a satchel or valise with him, and that it was not found after his death. How far this may have any bearing upon the question is a matter to be determined by the jury. The only light in which it is material this question should be considered is, how far it may affect the conduct of Tooley on the general question of negligence. If his journey ceased at Kankakee, then it cannot be claimed, under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk.

If he were going beyond Kankakee on the train, then there are other considerations which may affect the question of negligence. According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee on

the right to leave the car at Kankakee and return to it; y, he had the right to get off of the train—he was not er words, to remain inside of the car all the time. There ne circumstance which I ought to refer to in connection ession of the termination of the journey at Kankakee, that he did not purchase a ticket at Kankakee, and it ce that the train stopped there several minutes; and if he testimony on this point, he certainly had ample time ticket before the train started on to obtain coal. Still se is not conclusive. He had the right I suppose under nd management of the train, to pay his fare on the cars. circumstance to be taken into consideration by the jury. conditions of these policies is, as has been stated, that d comply with all the rules and regulations of the com-

We are not prepared to say that it was incumbent on e circumstances of the case, to make himself acquainted rules which might be contained upon the time card. We s clause of the policy a reasonable construction. A pol- l we suppose to any applicant. It is what is called an ey, and we are to infer that the meaning of this clause e traveler should only make himself acquainted with l rules, as to the management of the trains, and the ilroads, which are presumed to be known to travelers, circumstances. For instance, Tooley, as far as we know, er on this road. We cannot say that when he went on was obliged, because of this clause in the policy, to ex- e card and ascertain all the minutiae connected with the of trains, but only such rules as a general traveler might to know and ought to know. Any other construction ld operate as a snare upon travelers. To hold that the become acquainted with every minute rule which may on the back of a time card, we think cannot be said to eaning of this clause of the policy. But perhaps if he e time the train stopped at a particular place, there uestion whether it was not his duty to make some inqui- employees of the train, the conductor, or others. It is to in deciding this question of the negligence of Tooley, last question to be considered, and to which I call the he jury, that this is not an action between the represen- ley and the railroad, but between the representative of he underwriters upon this clause in the policy, "not ne-

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glecting to use due diligence for self-protection." And perhaps there can be no better rule stated than that which was agreed upon by the counsel, namely, that it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed; we think, also, in order to determine this question of diligence on the part of Tooley, it is proper to take into consideration whether or not when he alighted at Kankakee, which he had a right to do, any notice was given of the movement of the train. That may be an element which may have a bearing upon the question whether he was negligent or not. Was there any notice given, either by the ringing of a bell, or by word of mouth from the conductor or any of the employees of the company? If a person having a right to leave a train at a station is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion, and then is injured in getting on the train, it may be said that he is negligent—in other words, that he takes the risk of getting on the train while thus in motion. But having alighted at a station he has no notice given to him of the movement of the train, or he has not the opportunity, after notice given, to get on the train, and intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him; in other words, that the question of negligence is not to be tried by the same tests precisely, because we must make some allowance under such circumstances. It would be natural for a man—for even a prudent man—intending to go farther on the train, to make an effort even when the train is in motion, to regain his place on the train.

But while that is so, it is to be understood he must use due diligence in trying to get on the train, and to that question I will now direct your attention for a few moments, on the supposition that he intended to go further, and he had not an opportunity to get on the train, or he was not notified that the train was about to move. It was after seven o'clock in the evening; Tooley proceeded along the platform. There has some question been made whether the bell was rung. We think it perhaps ought to be assumed in this case that the fact has been established. It is proved that was the practice of the engineer just before the train started; that it was a signal to the conductor that the engineer was ready to proceed. It is also distinctly sworn to by the conductor that the bell was rung, and it is a fact stated by one or two of the witnesses that the remark was made

ringing," which under the circumstances of course is a fact. This is not otherwise contradicted than by the several witnesses, that they did not hear, or do not they heard the bell. However, we leave this question to be determined by the jury. Of course negative testimony is not as important as positive testimony, if you believe that the witness has stated the truth. There is some controversy as to the time of the night. Several of the witnesses say that it was dark; some that it was moonlight; and some state that it was blowing or storming. There is no doubt of this fact, or I may assume it, that the intent of Tooley was, when he saw the bell—or an intimation was given in that way, or by the motion of the cars—to get on the train. He proceeded rapidly to the rear platform; he tried to get on the train. Now, did he act as a prudent man, in getting on the train? Mr. Lawrence says he came around the corner of the station-house, and he was running, or walking fast, that he called out to him that he was only going to coal up, or something to that effect. Now, was Mr. Tooley bound to take any declaration from an outsider or an indifferent person as true, in relation to the motion of the train or its motions. The only effect of that is that it changes the measure of his responsibility; and gives you a different conduct—to his action; and you are to treat it in a different way from what you would provided he had no intimation given to him; because if a man, after being notified of a fact, which should govern or rule his conduct, chooses to go that way as to encounter risk or danger, you will see that his negligence is different. It is material for the jury to consider that light alone. And then it will be a question, as far as the conduct of Tooley, whether or not he heard what Mr. Lawrence, and of course it is simply a matter of fact whether or not he did hear; positively we cannot know. It is to be certain, that the words or the sound attracted his attention; he turned round; and it is for you to say whether he acted in a way as to give him warning that the train was not to stop at the coal-bins—whether or not he heard the language, or whether he heard a sound merely, without distinguishing or understanding what was said. All these are to some extent matters of fact, and it is for the jury to determine how far they may affect the case. He passed by the rear platform of the rear car; we leave it a fact to be taken into consideration by the jury in de-

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termining whether he did or did not act as a prudent man, if he believed that the train was going on, and wanted to get on the train to resume his journey. Of course you will understand that the danger was much less in getting on the rear platform than on the forward platform of the car. The fact is, that he did not attempt to get on the rear platform of the car. The train was moving slowly. It does not appear that he was actually running, although walking very fast. He attempted to get on to the cars, either on to the forward platform of the rear car, or between the two cars. If, in point of fact, when he slipped and fell he was attempting to get on between the cars, it is difficult to reconcile it with our ideas of prudence on the part of a man under such circumstances. That may be an important fact for you to inquire into—whether that is so or not, as I believe is stated by one of the witnesses. It is very much a question for the jury under these rules which the court has laid down, whether this man acted under the circumstances, conceding that he was going further—a prudent man; whether or not he was guilty of negligence. It is, perhaps, natural that the sympathies of a jury should be enlisted in favor of the man, or his representatives, or family; but this case, like every other, has to be decided under the law and facts, and you are to apply your best judgment and intelligence to the facts, taking the law from the court, and drawing your conclusions upon those facts without being influenced or biased by the relative positions of the parties. This is your imperative duty, and if you do any less than this you do not come up to the measure of your responsibility. This is not a question of sympathy or feeling, but of law and evidence. I will dismiss the case with one further remark. There has not been any light thrown upon the motives of the journey of Tooley from Chicago to Kankakee. We were left in ignorance of that when we tried this case before, and we are now just as ignorant. It may be that there is an impenetrable mystery hanging over this journey. It is said that he was going to Nokomis, in Montgomery County, which was his residence. In point of fact, when he was required to give his residence as a memorandum on the policy demanded, he gave it as Topeka, Kansas, not Nokomis, Montgomery County, Illinois. Of course this is no further material than as it may have a bearing upon the journey of Tooley. It is in one sense no matter of ours, or of the defendants, where he was going. That was not the question. He was insured for the two days, wherever he might go. There is nothing stated in these policies as to the proof of loss or damage, or the case might be, or as to the time within which the payment was

there were damage. It has been admitted that notice so as to that there is no controversy. The policy required should be given. Then we understand that the true conclusion would be that, if notice were given, it was the duty of the jury to pay within a reasonable time, and interest would run from the expiration of that time when the payment ought to be made. The jury do not know that it is necessary to trouble the jury with the evidence. The counsel will agree about that matter.

Question: Yes, your honor, we have agreed on that.

Answer: Very well, then, you may simply say, by your verdict, find for the plaintiff or the defendant.

Verdict for plaintiff for \$6,633.00.

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## SUPREME COURT OF KANSAS.

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*Error to Douglass County District Court.*

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WASHINGTON LIFE INS. CO., *Plaintiff in Error,*

*vs.*

HENRY HANEY, *Defendant in Error.\**

Representations of a party, whose life is insured for the benefit of another, after the application and the policy, cannot be received in evidence against the assured to impeach the truthfulness of the application.

The instrument is set out in full in an answer, and its execution not under oath, no issue is raised as to its existence, and therefore no error in rejecting either the original or a copy, when offered in evidence.

It is presumed that a policy of insurance is based upon the application, and on such policy it is not error to reject the testimony of the officer of the company that the policy was issued in the belief that the statements made in the application were true and would not have been issued if any of them had been known to be untrue.

If the case made, fails to show that all the instructions or all touching the question are preserved, it is impossible for this court to say whether there was any error in refusing a certain instruction; for it may have been given because already once given.

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Rendered January 14th, 1872. Syllabus by the court.



5. Where a policy of life insurance stipulated that it shall be void if any the statements in the application shall be found in any respect untrue, and where the application contains an instruction to the applicant to answer each question "to the best of his knowledge and belief, briefly but explicitly," and also a statement that answers made to the questions "shall form the basis of the contract for insurance, and also that any willfully untrue or fraudulent answers shall avoid the policy"—

*Held*, that the measure of truthfulness required by the policy was that indicated in the application, and that a mere misstatement, unless willful and fraudulent, would not avoid the policy on account of this stipulation.

BREWER, J.

Defendant in error, plaintiff below, recovered a judgment in the District Court of Douglass County on a policy of insurance issued by the defendant on the life of his wife, Eliza E. Haney. To reverse this judgment, this proceeding in error has been brought; the question presented in the record arises solely upon the exclusion of testimony and the charges of the court. Eight grounds of error are presented and discussed by counsel for plaintiff in error in their brief, yet the determination of two or three will dispose of them all and decide the case. The first and third points present the same question and may be considered together. That question is this: Can the declaration of a party, whose life is insured for the benefit of another, made long after the application and the contract, be received in evidence against the assured, to impeach the truthfulness of the application? The contract is between the assured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference, that the life being active can by its conduct affect the contract even so far as to annul it, while the building, being inanimate and passive, has of itself no such power, but aside from this, the rights and liabilities of the parties to the contract are the same. The party insured is not party to the record, and therefore her declarations are not admissible on that ground; she is not party in interest, as the whole benefit and interest inures to the assured; she is not the agent and authorized to speak for him, nor does she come within any other rule by which her declarations can be received against him. The question was fully examined and settled in the case of *Rawls vs. The American Life Ins. Co.*, 36 Barb. 357; *Rawls vs. The American Life Ins. Co.*, 27 New York, 282; *The Fraternal Mutual Life Ins. Co. vs. Applegate*, 7 Oh. St., 292. In the case of *Averson vs. Lord Kinnaid*, 6 East R., 188, the declaration made intermediate the application and the contract were admitted and in *Kelsey vs. Universal Life Ins. Co.*, 35 Conn., 225, declaration shortly prior to the application were received. In both cases how

considered by the courts as being so near the application  
 only a part of the *res gestæ*; and in the first case Lord  
 spoke of it as perhaps proper as a sort of cross ex-  
 the statement made to the medical man. While it may  
 noted whether the reasons given for these two decisions  
 will they in no wise conflict with the well settled princi-  
 which the other cases were, and thus must be decided.  
 ground of error is the striking out certain parts of the  
 the officers of the company. The depositions were of  
 and the medical examiner. That which was stricken  
 a copy of the application. As the application was set  
 answer, and not denied under oath, its execution was ad-  
 to offer the original would have been surplusage in the  
 The second part struck out was a statement of the man-  
 aging business in the home office of the defendant. We  
 saw the ruling of the court either way on this could have  
 any to either party. The third, and that which presents  
 difficulty, is the striking out from the deposition of the  
 following: "I approved it and a policy was there-  
 in accordance with the application. In approving of it,  
 I was entirely by the answers and representations contained  
 in the application, and by the fact that it had been approved by the  
 manager of the company. I never should have approved of  
 it, nor would the policy have been granted, had I known,  
 as stated therein, that the parents, or either of them, of  
 whose life was to be insured, had died from the effects of a  
 severe pneumonia, or that her brothers or sisters had died of  
 the same, or that the party whose life was to be insured had had  
 the lungs. The application was approved, and the policy  
 issued in the full belief on the part of the company that the re-  
 sponses and answers contained in the application were true, and  
 could have been issued had I or the company supposed or  
 been led to believe that the representations and answers con-  
 tained in the application were in any respect false." The ruling of  
 the court is correct. How far false statements, if any there were  
 made, affect the validity of the contract is a question of  
 law, and not one to be settled by the opinion or judg-  
 ment of the jury. The contract is based upon the application.  
 It assumes this, and determines the nature and extent of the  
 liability. Are the statements true? That is one question, and this  
 throws no light on it. If false, were they willfully false?

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If false, did their mere falsity, independent of any question of terality or willfulness, avoid the contract? It is too plain for controversy that upon these questions this testimony has no bearing, may be laid aside as immaterial. Nor can the question of materiality be decided or affected by this testimony. Where the application is in writing, the law determines what is and what is not material, a determination which applies to all similar contracts. *Campbell vs. New England Mutual Life Ins. Co.*, 98 Mass., 402; *Miller vs. Mutual Benefit Life Ins. Co.*, 31 Iowa, 232.\* Of course the entering into a contract is as to either party a voluntary matter. Each insurance company may determine for itself upon what conditions it will make its contracts. It may lift any trivial, unimportant matter into an essential pre-requisite and condition of the contract, and no person can make any legal complaint because it insists upon such conditions, and any legitimate testimony, which shows that it made such immaterial matter a condition of, or material to, its contracts, may be given in evidence. Of such nature is the testimony offered in the case of *Valton vs. The Nat. Fund Life Ins. Co.*, 20 N. Y., 32, where the company's officer stated, during the pendency of the negotiations, that the company would not take a risk under certain circumstances which in fact existed, but the applicant represented did not. Neither party can, without the knowledge of the other, lift an unimportant and trivial thing into a material and essential fact; and where the contract has been executed by the other party, and it is called upon to perform its obligations, say that it intended this trivial matter should be essential, and that it did not exist as represented. If the party would make anything material, other than what the law says it must be made known to the opposite party prior to the contract. Otherwise the law will determine what is material upon the transactions as they took place between the parties. Hence, what the president of the company considered material, and what he would have done if he had known certain things, is immaterial, unless such judgment and determination were communicated to the other party prior to the contract. Not being thus communicated, they were properly rejected by the court on the trial.

The remaining points arise on the charge of the court. On the application of the plaintiff, the court gave this instruction: "If Mary Haney answered the questions put to her to the best of her knowledge and belief, any misstatement by her, unless the same was made willfully and fraudulently, will not avoid the policy." The court also

\*1 Ins. Law Jour'l, p. 26.

ard fails to show that all the instructions are preserved, and upon the particular points embraced in these, it is never under the ruling in *Madders vs. Chapple*, 10 Kan. anything here we can properly consider and decide. It may have been so because already given, and that given when accompanied and qualified by others, so as really to state the law exactly as the counsel for plaintiff in error insist it to be. We find in the record one instruction that qualifies, given at the instance of the defendant. "If at or before making the application for insurance *Eliza E. Haney* was afflicted with consumption, or any of the other diseases or infirmities named in her application, and as to which she was interrogated and answered 'No,' then the policy is void and the plaintiff entitled to recover." More of similar import may have been given. Yet the charge is positive, clear and free from any ambiguity, and if it was misapplied, it was improperly, may have misled the jury. It becomes necessary to examine it, and in its examination we cannot

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avoid touching incidentally some of the instructions refused. policy stipulates as follows: "This policy is issued and accepted by the assured upon the following express conditions and agreements:—"

"1st." Here are enumerated a number of conditions, among the following: "Or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue." Then follow others, and then is the following: "Then in every such case the said company shall not be liable for the payment of the sum insured or part thereof, and this policy shall be null and void." We do not understand this clause, "upon the faith of which this policy is issued," as limiting this condition to a portion of the application, or any particular statements therein. It does not mean to imply that there are certain statements which must be true because the policy is based upon them, while others are immaterial. It means that the policy is issued upon the faith of the whole application with all its statements and declarations, and that if any of them are untrue, the policy is avoided. We must therefore consider the application as a whole, and each party has a right to have it so considered. If the application propounds certain questions and indicates in what manner they must be answered, it is enough that they are answered in that manner, and when the policy is based upon the statements and declarations of the application, it is based upon them made in that manner and under the rules laid down by the company in the application. If we turn now to the application we find under the heading "Instructions in filling up this application," "First, answer each of the questions on the first page to the best of your knowledge and belief, briefly but explicitly," and at the close of the questions and answers of the applicant, and just before her signature, is the following: "I am hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any willfully untrue or fraudulent answer, or any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, will render this policy null and void, and forfeit all payments made thereon." While the policy for its validity requires truthfulness in the statements of the application, it is enough if they are true according to the degree and conditions of truthfulness required by the application. This is all that the parties want when they spoke of truthfulness in the policy; to suppose otherwise, and suppose that the company meant one degree

the application, and another in the policy, is to impute which the law will never presume, and if shown to exist, gain. We think, therefore, the court properly gave the judgment by plaintiff, and in so far as those refused conveyance, they were erroneous.  
JUDGES concurring.

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UNITED STATES CIRCUIT COURT,  
DISTRICT OF CALIFORNIA.

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WILLIAM H. YOUNG, ADMINISTRATOR OF MCPPHERSON  
DECEASED, *Plaintiff,*

*vs.*

WASHINGTON LIFE INS. CO., OF NEW YORK,  
*Defendant.\**

It is a general rule that forfeitures are not favored, and that contracts for forfeitures are strictly construed.

—These principles apply to forfeitures in policies of insurance payment of premiums when due.

Forfeitures provided for in policies of insurance are for the benefit of the party insuring, and may be waived by such party.

Where, subsequent to the accruing of a forfeiture under the policy of a life policy for non-payment of premiums, the insurer, with knowledge of the facts, by its own acts, or those of its agents, recognizes the forfeiture as still subsisting, and manifests an intent not to take advantage of the forfeiture, and does no act prior to the death of the assured to waive the purpose to claim a forfeiture—the court will be justified in denying recovery of the forfeiture.

Consequently, the liability of the insurer accrues on the death of the insured, and it is too late afterwards to claim for the first time the benefit of the forfeiture.

WILLIAM H. YOUNG, *for Plaintiff.*

W. H. BERGIN, *for Defendant.*

SAWYER, C. J.

In January, 1867, McPherson Young made application to H. S.

January 20th, 1873. Syllabus by the Court. From *Pacific Law Re-*

Homans, General Agent of the Mutual Life Insurance Company of New York for the Pacific Coast, at the office of said company in the city of San Francisco, for a policy of insurance on his life for \$50,000 and said Homans delivered to him a memorandum of agreement writing bearing date on that day, acknowledging the receipt of "ninety-nine and 30-100 dollars, being the first quarter annual premium on his application for a policy of insurance of the Mutual Life Insurance Company of New York, for the sum of five thousand dollars, on the life of Mack P. Young, payable at 45, or death, and premiums paid up in ten years. Said policy of insurance to take effect and be in force from and after the date hereof, provided that the application shall be accepted by the company; but should the application be declined or rejected by the said company, then the full amount hereby paid will be returned to said applicant upon the production of this receipt."

The application of said Young was transmitted by Homans to the defendant's office in New York by steamer, the time of passage at that time being from twenty-three to thirty days. The application having been accepted, a policy was duly made out, signed and sealed and transmitted to said Homans at San Francisco, and was received by him on or about August 2nd, 1867. The policy bears date August 5th, instead of June 5th, the date of the foregoing receipt, and, consequently, the time of payment indicated by the two writings do not correspond. The policy recites the consideration to be \$9,000 paid by Young, and of the quarter annual payment of a like amount on or before the sixth days of April, July, October, and January in every year. The first quarter's premium, the receipt of which is acknowledged in said memorandum, and in said policy, was not in fact paid in cash, but the promissory note of said Young was given therefor, payable in sixty days without grace, which note fell due August 4th, 1867. The policy states that it is issued and accepted "upon the following express conditions and agreements," among which are :

"Second.—If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, then, in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine."

"Third.—In every case when this policy shall cease and determine

be null and void, all payments therein shall be forfeited  
any."

to the policy were two regular receipts, duly made and  
proper officers in New York, dated at New York, April  
6th, 1867, respectively, with blanks to be countersigned  
for the Pacific Coast, purporting to be for the premiums  
quarters, commencing at their respective dates. These  
their arrival at San Francisco, were duly countersigned  
Homans, agent, stamped, and the stamps canceled with  
San Francisco office canceling stamp on August 2nd, 1867, as the  
canceling marks on said receipts show. On August 8th,  
letter was addressed from the office of said defendant in  
to said Young:

SAN FRANCISCO, *August 8th, 1867.*

, Esq., Vallejo, Cal., *Dear Sir:*

of insurance with the Mutual Life Insurance Company  
Please inform me whether I shall send it to you at  
you will call and get it when you are in the city?

Respectfully yours,

H. S. HOMANS, General Agent.

Per R. W. HEATH, Jr.

a clerk in the said office under Homans, but whether  
delivered to, or received by, said Young, or when or in  
forwarded, or when, or in what manner it came to the  
the plaintiff, the administrator, does not appear from

No notice of the acceptance of said application or of  
arrival of said policy is shown to have been delivered to or  
said Young. Nor was any demand made upon him for  
payment, nor any receipt or notice requiring payment pre-  
sented, and neither said note, nor any subsequent installment  
was in fact paid; said note was never surrendered or of-  
ficially surrendered, but said note and said receipts are still in  
said company.

On the 21st, 1867, said McPherson Young was shot with a  
bullet, and mortally wounded. On the next day he was  
admitted to St. Mary's Hospital in San Francisco, where he was  
retained from the time of his arrival till September 20, 1867,  
and died from the effects of his wounds. From the time of the

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shooting till his death said Young was neither physically nor mentally competent to transact any matters of business.

After the death of Young, but at what date does not appear, said general agent wrote upon the back of the policy with pencil words, "cancel, dead," and sent the policy to the defendant, in New York.

The policy was canceled October 31st, 1867, by tearing off the head of the company, and the signature of the president; cutting a small hole out of the body, and writing upon the back in blue ink the words, "C. Oct. 31, '67, Homans." Shortly after the death of Young, notice was duly given to the general agent, and payment was demanded, but refused on the ground that the defendant was not liable. The plaintiff is the administrator of the deceased.

It is not denied that there was a contract made. The receipt and memorandum issued to the applicant, dated June 5th, purports to have its face to insure him from its date, provided, only, that the application should be accepted by the defendant. It was accepted, and a policy in due form fully executed and sent to the San Francisco agent to be delivered. These acts, it is conceded, constitute a contract.

But it is insisted that, although the memorandum of agreement dated June 5th does not specify all the terms of the contract, it is implied that the policy shall be upon the usual terms embraced in the company's policy; that the acceptance was upon the terms of the policy; that it was actually prepared and executed, and that under these terms the policy became forfeited for non-payment of premiums, as required by one of its express conditions. The defendant claims that the premium was given for the first quarter's premium not having been paid when a forfeiture resulted. If not, then that a forfeiture accrued upon non-payment of the second quarter's premium, which fell due on July 5th, if the date of the policy, or on September 5th, if the date of the receipt and memorandum of June 5th is to control.

The plaintiff insists that it is incompetent to show a non-payment of the note against the acknowledgment of the receipt of the money in the memorandum of June 5th, and also in the policy for the purpose of defeating the contract; that the note was accepted as payment, and the defendant is estopped from denying it for such a purpose. It was so expressly held in *Provident, etc., Insurance Company vs. Fennell*, 49 Ill., 180. This, I suppose, is on the principle recognized by the authorities, that such acknowledgments are often to be regarded as presenting a double aspect—firstly, as a simple receipt for money, secondly, as constituting a part of a contract. In the

for collateral purposes, such as the recovery of the money, judgment may be contradicted. In the second, and for of defeating the operation of the contract, they cannot be. These distinctions are discussed in Peck vs. Vandenas there cited, 30 Cal., 23, and Ashley vs. Vischer, 24 Goit vs. National Protection Insurance Company, 25 Barb.,

will not rest my decision on that ground.

The plaintiff further insists that if there was a forfeiture, it was defendant. It is elementary law that forfeitures are not for that provisions for forfeiture must be strictly construed. Courts also hold that these principles are applicable to for-insurance policies; that the provisions for forfeiture are in the benefit of the companies, and may be waived by them; courts will find a waiver upon slight evidence. See among Ripley vs. Aetna Insurance Co., 29 Barb., 557; Goit vs. National Protection Insurance Co., 25 Barb., 189; Baker vs. Union Insurance Co., 6 Robt., 394; Boehen vs. Williamsburg Ins. Co., 31; Bouton vs. Am. M. L. Insurance Co., 25 Conn., 542; Merchants' Mut. Ins. Co., 19 Lou. An., 214; Insurance Co., 6 Wal., 129.

These principles to the facts of this case. The policy bears date June 5th, and the receipts prepared by the company correspond to the date. The company, therefore, regarded the second premium as due July 6th, and acted upon that idea, although no payment was made, and the first memorandum receipt and contract were given on June 5th. The promissory note given for the first premium being payable without grace, fell due August 4th. It is then that the condition of the policy imposing a forfeiture, was intended to be made "at the office of the company in the city of New York, or to agents when they produce receipts signed by the secretary, unless otherwise expressly agreed in writing." There is no evidence in this case of its having been otherwise agreed. It does not appear that the policy was received at the New York office before the 2nd of August. At or about the sixth of August the policy must have been in the defendant's office in New York. It would give twenty-seven days to August 2nd, to make it payable to San Francisco. The defendant knew at the time of the policy that the second installment of premium had not been paid at the office in New York. It also knew that it could not pay its agents here in accordance with the terms of the con-

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tract, so as to be obligatory upon defendant, for the reason that *only receipt duly signed as specified in the policy* authorizing the payment to its agents was attached to the policy, and would not reach San Francisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York, or it would not have sent its receipt to its agent to enable him to receive payment. The defendant, then, by its officers in New York, transmitted the policy and receipts, with knowledge that payments had not been made and would not be made at the office in New York, and that it *could not be made elsewhere* in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intimation that it should be delivered and payment received by its agent in San Francisco, although it knew that there must necessarily be a forfeiture upon the strict letter of the contract. Also, after the receipt of the policy at San Francisco, on the second of August, nearly a month after the second installment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt ready for delivery upon payment, thereby treating the agreement as still in force. Again, on the eighth of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and necessarily with knowledge of non-payment of both the note and second installment, the agent of the defendant addressed to Young the receipt before set out in this opinion.

This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy, or make payment. It simply notifies him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the 2nd to the 8th of August at least, before the notice to Young was even written, and it does not appear when it was sent. It does not appear that this or any other notice reached him. No other act of the company is shown inconsistent with this action, or tending in the slightest degree to show an intention to insist upon a forfeiture till after the death of Young, when the policy was canceled, October 31st, payment of loss having before been refused.

hardly have been expected that Young would call to make payment until notified whether the risk had been accepted, as there was ample time between June 5th, when the application was made, and the 5th of September, the time when the next premium would have fallen due, had the date of the policy agreed upon at the date of the application, and the preliminary memorandum given to him by defendant's agent in San Francisco. The court supposed that notice of acceptance or rejection would have been given before the note for the first quarter's premium would have been paid. But however this may be, the several acts of the defendant, and the acts of its officers in relation to the matter at issue, and the acts of the court, which were performed subsequent to the accruing of the premium, if any accrued, treat the agreement for insurance as subsisting. They affirmatively indicate an intention not to insist upon forfeiture, and had the accident and death not occurred, there would have been no doubt, from the facts shown, that even as late as the death of Young, the premium would have been received and the policy deemed valid. In the case cited by counsel of Chipman, against the same company, tried in this court a year ago, there was no act of any kind on the part of the company indicating an intention to insist upon forfeiture, or in any way recognizing a subsisting contract. In this case, all the acts of the company after the forfeiture of the policy, and prior to Young's death, shown to the court recognize the policy as still subsisting, and manifest an intention not to claim

upon the facts, the court must find a waiver of any forfeiture that may have accrued, and that under the circumstances, after the death of Young, the assured, it was too late, for the first time, to insist upon forfeiture.

The plaintiff have judgment for the amount of the policy, less premiums, and interest from the time payment should have been made.

ST. M. L. I. CO. v. YOUNG

## SUPREME COURT OF MISSOURI.

MARCH TERM, 1872.

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*Appeal from St. Louis Circuit Court.*


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THE LIFE ASSOCIATION OF AMERICA, *Appellant*,*vs.*THE BOARD OF ASSESSORS OF ST. LOUIS  
COUNTY, *Respondent*.\*

The assessors of St. Louis County assessed for the year 1870 money on land and bonds and notes of the value of \$294,000.00 belonging to the appellant mutual life insurance company organized under the laws of the State, having no capital stock.

The statute provided that life insurance companies organized under the laws of the State should pay certain fees to go to the support of the insurance department, which should be in lieu of all fees and taxes whatsoever, except that they might be taxed on their paid-up stock.

The constitution of the State in the declaration of rights declares that all property subject to taxation ought to be taxed in proportion to its value, and also provides that "no property, real or personal, shall be exempt from taxation except such as may be used exclusively for public schools, libraries, such as may belong to the United States, to this State, to counties, or to municipal corporations within this State."

This law must be construed in subordination to the constitution of the State. The word "ought" in the constitution is not directory, but mandatory.

Under the provision of the constitution the legislature had no power to exempt the company's property from taxation or to commute the taxes upon the same.

The act in question cannot have the effect of exempting the appellant's property from taxation.

Although the assessment could not be made under the provisions of the statute in regard to assessing shares of stock, it could be made under the general revenue law.

IRWIN L. SMITH AND T. F. GANTT, *for Appellant*.F. AND L. GOTTSCHALK AND THO'S C. REYNOLDS, *for Respondent*.

\* Decision rendered April 1872.

WAGNER, J.

Assessors of St. Louis county assessed for the year 1870, furniture on hand, and bonds and notes of the value of \$294, belonging to the appellant. To obtain relief from this assessment proceeding was taken to the Circuit Court by *certiorari*. The assessment was sustained. The appellant is an association organized on the mutual plan for the assurance of lives, and claimed that by the law of this State their property is exempt from assessment and taxation. This claim is based on a section of the act in regard to the incorporation and regulation of life insurance companies, approved March 10th, 1869, chapter 752, sec. 40. The section provides that the life insurance companies referred to shall pay certain fees which shall go to the superintendent of insurance department, and shall be in lieu of all taxes, licenses whatsoever collected for the benefit of the State. Companies organized under the laws of the United States, or this State, doing in this State the business mentioned, shall be subject to existing laws relating to fees and licenses for county and municipal purposes. The further provision is then made that all companies organized under the laws of this State and doing the business mentioned shall pay all fees required in the section, which shall be in lieu of fees or taxes whatsoever, except that they may be taxed on paid-up capital stock in the same manner as other property owned by, for county and municipal purposes.

The organization of the appellant it has no paid-up capital. Its property consists wholly of its assets, and if effect is given to the section, its entire property is exempt upon the payment of the stated fees. This law must be construed in subordination to the constitution of the State, and the question is whether it violates the constitution. Under the former constitution the legislature undoubtedly passed the law, as there was then no provision for exemptions, and the whole matter of taxation was confided to legislative discretion. But there are two clauses in the constitution which have a direct bearing on the subject, and which control all legislative action.

The first is embodied in the declaration of rights, art. 1, sec. 30, which provides that "all property subject to taxation ought to be taxed in proportion to its value;" and the second is section 16 of article 9, which provides that "no property, real or personal, shall be exempt from taxation except such as may be used exclusively for public

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schools, and such as may belong to the United States, to this State, to the counties, or to municipal corporations within this State."

Some criticism has been indulged in by counsel on the phraseology of the first clause, and it is contended that the word "ought" is not appropriate; that the provision was simply intended to be directory; that as to uniformity of taxation it amounts to a recommendation, but is not imperative. The old constitution used the word "shall" but it is evident from a survey of the whole instrument that the substitution of the word "ought" for the other was not intended to produce any change in the construction or the duties enjoined. The word designated is expressive of a duty and equivalent to a prohibition against proceeding in any other way. This is abundantly manifest by comparing the phrase used with others, which all will concede imperative and mandatory. Thus the constitution in other sections declares "that all elections ought to be free and open;" that "courts of justice ought to be open to every person," etc.; "that no private property ought to be taken for public use without just compensation," and "that the people ought to be secure in their persons, papers," etc. These are positive injunctions which cannot be denied, and their obligatory force would be in no wise strengthened by inserting the word "shall" "ought."

Under the former constitution, when this provision was in the constitution for interpretation, it was decided that the clause was evidently mandatory upon the General Assembly, when exercising the taxing power, and furnished a rule which was not to be departed from. But it was said that the settlement of the question what property should be subjected to taxation was left to their discretion. *Hamilton & Treat* in *Louis County Court*, 15 Mo., 1; *State vs. North & Scott*, 27 Mo., 4. Since these decisions, however, that discretion has been withdrawn from the legislature, and they are now expressly forbidden from exempting any property from taxation.

But it is claimed that although the legislature may not have power to exempt property from taxation, it has the power to commute taxes, and that the 40th section is a commutation. In Illinois the doctrine has been announced under a constitutional provision not entirely similar to ours, but intended certainly to produce uniformity of taxation. The first case was the *Illinois Central Railroad Company vs. McLean County*, 17 Ill., 291, where it was held that the provision in the charter of the railroad company exempting its property from taxation upon the payment of a certain proportion of its earnings was constitutional; and the second was the case of *Hunsaker et al.*

al., 30 Ill., 146, where the court decided that the legislature could commute a tax for the payment of money or other equivalent. In these cases there was no claim of exemption, but sums of money were paid, and burdens assumed in lieu of taxes. An attention to the cases has failed to convince me that they were based on correct principles.

When an act of incorporation was passed exempting property, under certain circumstances, from general taxes, upon the payment of a special tax. The Supreme Court held the law to be unconstitutional. In their opinion they use this language: "The very last principle that should be adopted would be one that makes it conform to the Constitution; and we are clear in the opinion that if it is claimed for it, and intends to provide for the exemption of any part of the property in a municipal corporation, otherwise subject to taxation, from contributing its proper proportion to the common revenue fund, it is in conflict with the second section of the first article of that instrument, and should be treated as a nullity. Before the adoption of the present Constitution, the whole subject of taxation was committed to the discretion of the General Assembly."

It might be levied upon such property, and in such proportion as that body saw fit. The right to make exceptions and exemptions was unquestionable. But this discretion no longer exists. When burdens are made to rest upon the property of the State, and no money is to be raised by taxation, the positive injunctions of the laws shall be passed, taxing by a uniform rule all moneys, and investments in bonds, stocks, joint-stock companies, or otherwise, also all real and personal property, according to its true value in money." *City of Zanesville vs. Richards, Auditor, etc.*, 5 Ohio 189.

We had as much of the characteristics of a commutation as of a tax under consideration. The State there undertook to exempt property and make it liable only for the payment of a road tax, where there is an exemption, and only certain fees are required. We rejected the claim and construed the organic law according to the obvious import and the unquestioned intentions of its

constitutional provision, essentially the same as ours, and for uniformity of taxation, the Wisconsin Legislature passed a law requiring railroad and plankroad companies to pay for the

State one per cent. of the gross earnings of their respective lines, which should be in full of all taxes of every kind upon

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such roads or other property belonging to such companies, or stock held by individuals therein, and in 1855, in the case of the *Waukeesha and Mississippi Railroad Company vs. the Supervisors of Waukesha County*, the Supreme Court held the act to be constitutional. The case was never reported, and the judgment seems to have been hastily made and not well considered. The question was again presented in 1862, in the case of *Kneeland vs. City of Milwaukee*, 15 Wis., 454, and the court declared that if the question was a new one, they would not hesitate to hold that the act was in violation of the Constitution, but that in view of the fact that all the taxes of the State, and all the private transactions growing out of it, for many years been conducted on the theory of its validity, and in view of the disastrous consequences which would flow from overruling the decision after such a lapse of time, they felt bound to adhere to and abide by the former ruling.

No such difficulty environs this court in deciding this question. The Constitution is now to be construed for the first time, and the determination herein will not interfere with property rights before upon a different adjudication. The section by which freedom of taxation is claimed is more of an exemption than a commutation. It does not provide for the payment of any sum to the general revenue in lieu of taxes, but only certain fees to the support of an officer. It is incredible that the Legislature intended that taxes on hundreds of thousands of dollars, which may come into the hands of wealthy corporations, should be commuted for the yearly payment of a hundred and fifty or two hundred dollars in official fees. But I am not inclined to the belief that this power of commutation exists under the present Constitution. The literal reading of the two clauses here before referred to are surely in opposition to it. The Constitution, by its injunction that no property should be exempt from taxation, and the requirement that it should be taxed in proportion to its value, was framed with the express view of remedying a great mischief. It is well known that under the former Constitution the burdens of taxation were often unequal and unjust. Capitalists and corporations were in the habit of getting exemptions, so that a large proportion of their wealth was withdrawn from paying its proportionate share in administering the government, and a corresponding increase was thrown upon those who were least able to pay. The small property holders, who comprise the great mass of the tax-payers, usually paid their taxes promptly, without question, and seldom combine for the purpose of procuring any special privileges or exemptions. But capital

and eager, lynx-eyed and vigilant, always ready to reach for  
shrink from burdens, able and ready to bring powerful  
ns to bear to influence legislative action, will be always  
ke advantage of a construction of the Constitution which  
it to shift the burdens it ought to bear on the shoulders of  
was to avoid this injustice and to cut off all importunity  
gislation, that the Constitution made the provision forbid-  
discrimination. But, if what was intended as a safeguard  
ple's rights can be avoided by granting an immunity under  
e of accepting the merest trifle as a commutation, the in-  
s practically nullified and the clause is a sheer delusion.  
ruction of the Constitution by this court which would vir-  
al its efficiency, would be as unwarranted as it would be  
o the rights of our citizens.

re come to the conclusion that the act in question cannot  
fect of exempting the appellant's property from taxation.

urther insisted that, although the court should be of the  
at the act did not work an exemption from the payment of  
there was no law in force authorizing the officers to make  
ment. It is true the assessment could not be made under  
twenty-three and twenty-four of the statute, Wag. Stat.,  
these sections have reference to assessing shares of stock,  
are no shareholders in the appellant's company. But the  
owned the property, and had it in his possession, and there  
to prevent its assessment under the general revenue law.  
section of the law declares that taxes shall be levied on all  
real and personal. Wag. Stat., 1159. And it is made the  
e assessor, in administering the oath to tax-payers, to swear  
ve a true and correct list of all taxable property, including  
ney and notes, or bonds in hand or on deposit, owned by  
der their charge. Wag. Stat., 1167, sec. 12.

o-president of the company gave in the property as under  
and owned by the company, and he could have done no-

The property was certainly liable to taxation, and be-  
longed to a corporation and did not come within the cate-  
gories or stock, it was not entitled on that account to be ex-  
om assessment under the general provisions of the law. I  
opinion that the assessors had full authority for their action,  
the judgment of the Circuit Court should be affirmed.

er judges concur.

ST. M. C. & C. CO.  
NEW YORK

## SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1871.

*Appeal from Peoria Circuit Court.*THE SECURITY INS. CO., OF NEW YORK, *Appellant,**vs.*DE WITT C. FARRELL, *Appellee.\**

The company issued a policy upon a quantity of high wines, which were destroyed by fire while on deposit in the distillery warehouse, and before the United States tax of fifty cents per gallon had been paid, or any order from the Government for the withdrawal of the spirits had been given. The high wines, without the payment of the government tax, were worth forty-nine cents per gallon at the time they were destroyed.

The tax of fifty cents per gallon was added as a burden upon the consignment and not upon the distiller.

Though a lien for the tax existed on the high wines from the time of distillation, for the prevention of fraud, the personal liability of the insurer was only upon removal or breach of the condition of the bond.

Therefore the liability of the insurance company was only for the value of the spirits at forty-nine cents per gallon.

THORNTON, J.

This suit was brought upon a policy of insurance.

The high wines insured were worth forty-nine cents per gallon without the payment of the tax, and ninety-nine cents per gallon with the tax paid. When burned, they were on deposit in what was known as the distillery warehouse. The tax had not been paid, and consequently there had been no order for the withdrawal of the spirits from the warehouse.

The question chiefly argued, and which we shall consider, is whether the insurance company is liable for the high wines valued at forty-nine or ninety-nine cents per gallon?

\* Decision rendered January 22nd, 1872.

olves the further and the real question, whether the assured the United States for the tax of fifty cents per gallon un-

s. If of appellee it is contended that the Act of Congress of 1868, imposing taxes on distilled spirits, creates a liability distiller for the payment of the tax from the time of the of the distilled spirits; and that therefore the tax added in estimating their value, and in determining the be paid by the insurers.

sisted on the part of appellant, that the recovery can r the value of the spirits, without any regard to the sup- lity to the United States.

by any authority furnished, or which we have been able to rponding the act in question, we have carefully examined d given mature consideration to the arguments of counsel, ew of arriving at some satisfactory conclusion. tion is not free from difficulty, and must be solved by re- he Act of Congress.

nterpretation of a statute of doubtful meaning, we should possible, the legislative intent, and have regard to the remedied and the object to be accomplished by the enact-

he object of this act was to obtain revenue. For this pur- ous special taxes and licenses were imposed upon the dis- the tax of fifty cents upon every proof gallon of spirits as a burden upon the consumer, and not upon the dis- cious provisions unmistakably indicate this intention.

illier, with a distillery of certain capacity, must pay monthly wo dollars per day. If he produces one hundred barrels or the year he must pay four hundred dollars as special four dollars for each barrel in excess of one hundred. All taxes must be paid by the manufacturer upon demand, e spirits have ever been in the warehouse or not.

ontrary, every reference to the payment of the tax of fifty ach gallon is to the effect that it shall be paid before re- the warehouse. When about to be removed, this tax id. The spirits then go into the hands of the consumer, e an article of commerce.

chief object of the act, with its seemingly unnecessary f words, was the prevention of fraud, and of all attempts of distillers to evade the payment of the taxes.

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As a part of the history of the country, as we gather it from reports of the public departments, and the debates in Congress on the pendency of the bill, the mischiefs arising under pre legislation imposing taxes on distilled spirits, were regarded as a serious evil. Millions of gallons were spirited away, escaped taxation and the revenue from this source was constantly lessening.

The design was to remedy these evils, and to effect it there was a necessity for almost innumerable checks and safeguards.

The provisions relied on as creating the personal liability of the distiller for the payment of the tax per gallon from the time of distillation, are contained in sections one and four of the act.

Section one provides that "every proprietor or possessor of a distillery, or distillery apparatus, and every person in any manner interested in the use of any such still, etc., shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled in the distillery used for distilling the same, the stills, vessels, fixtures, tools therein, and on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time the said spirits are distilled until the tax shall be paid." It is asserted that this sentence asserts a personal liability, as well as a lien, from the time the spirits are distilled. This is neither a proper nor a necessary construction. The two clauses are distinct and independent, and for a different object. The one declares a liability upon all persons interested, without reference to time. The time for the commencement of the liability is controlled by prior and subsequent provisions. The object was to make a joint and several liability upon all persons concerned for the security of the tax.

The other creates a lien from a specified time upon certain enumerated articles, so as to prevent any evasion of payment by a claim on the spirits, or by mortgage or sale of the property. There is therefore, a necessity to make the lien begin at a fixed period.

The liability, however, is complete, without regard to time, if there is no language to restrict its commencement. We shall endeavor to show hereafter that there is such limitation.

After the destruction of the property there can no longer be a lien. There must be possession of the goods which are subject to the lien, either actual or constructive. This presupposes the existence of a substance—real, and not imaginary—upon which the lien may operate. When the substance ceases to exist, the lien ceases.

[Concluded in May Number.]

## MISCELLANEOUS DEPARTMENT.

### WRIGHT'S SAVINGS BANK LIFE INSURANCE.

I have remarked that there is no more difficult question in life insurance than that of the proper apportionment, among the various items, of the working expenses of a life insurance company, and of the surrender values of discontinued policies. The custom, which has been followed in this country, of increasing the premiums by a high percentage loading, it is confessed, is unequal and injurious. For example, comparing the gross premium, at the age of 25 years, for \$1,000 of insurance with the Mutual Life Insurance Company of New York, with the net premium, charged for the same insurance at the same age, we find serious incongruities.

	Premium.	Net Premium.	Margin.
Gross ordinary life premium	\$19.89	\$14.72	\$5.17
“ 20 y'r endow'm't “	47.68	37.38	10.30
“ 15 “ “	66.02	52.62	13.40
“ 10 “ “	103.91	84.15	19.76

By the column of margins, a short endowment policy of 10 years at the age of 25 years, is seen to be assessed nearly four times as much per year for the expenses of the company as one that is issued at the same age on the ordinary life plan : and, in general, the expenses of short endowment premiums are loaded far more heavily than the expenses of ordinary life premiums, although the risk carried by the former is much less than it is in the latter. The incongruities, which characterize all the life tables, engaged the attention of the learned actuary, Hon. Elizur Wright, many years ago, and his experience in grappling with the difficulty and conquering it is related in his own characteristically unique style :

“ When there was committed, long before I was born, and before I was born in America, a blunder in what is called ‘load-  
ing premiums,’ which of course extended to agents’ commissions and assessment of expenses among the members. This was

adopted unwittingly in this country, with most of the other rules and practices of the business. It did not become very apparent or troublesome till we had gone largely into the practice of issuing endowment policies. Then, when it was attempted to distribute surpluses either on the percentage or 'contribution plan,' the most astounding and unsatisfactory results developed themselves. I, for one, discovered that something had got wrong end foremost, but I was unable to see what, or how to set it right. I carefully explored the literature of the British Institute of Actuaries, but got no help from it. Hints of the trouble were given in the Ninth Report of the Massachusetts Insurance Commissioners in 1864 (See Report with Appendix, 1865, pages 274 and 366.) By about 1869, when the blunder was cheating the people out of millions, for nobody's benefit but the agents', all at once the right way of assessing expenses, compensating the agents, and keeping the accounts of a life insurance company dawned upon me. Not to have discovered this before was intensely and almost intolerably mortifying. For nobody more heartily than I had recommended endowment insurance policies. Tens of thousands had taken them, and on the short terms been as good as cheated every mother's son of them. And I had ignorantly acquiesced in this stupid and stupendous blunder by which this was brought about. I could have torn the hair off from the top of my head if there had been any there, and it would have done any good. And yet I was as sure as ever that endowment policies were the right ones to issue *if they could be dealt by equitably as to the expenses.*"

Following out this discovery, Mr. Wright elaborated a new system which was published in 1872, in a folio volume of 181 pages, containing a mass of tabular calculations of 268 endowment premiums, terminating at the ages of 40, 45, 50, and so on to the age of 75, which he took as the extreme limit of useful insurance, with margins constituting the new method.

Soon after the late attempt of the Mutual Life Insurance Company of New York to reduce its margins to an extremely low percentage standard, and the failure of the attempt for reasons not necessarily to be stated, and while the public mind was still interested in the questions involved, Mr. Wright embraced the very favorable opportunity to issue a public challenge, in which he invited any one to demonstrate to the satisfaction of one or both of two distinguished mathematicians named by him, "that the old system answers better to his own three questions, which are of the greatest interest to the public."

to ascertain the proper commissions to be paid to agents, paid?

to assess the office or working expenses, including commissions to the members of mutual companies?

to ascertain the correct surrender value of a policy?"

What accompanies this challenge with the offer of a prize of the successful contestant.

It is in some respects abstruse, but by a little pains-taking every person will be able to form some just estimate of the plan, and the extent to which it performs the important business of adjusting the margins, the surrender values, and the commissions to the relative equities of the policy holders.

We call attention to three fundamental propositions: First, that an insurance company may rightfully require the assured to contribute a common expense with his fellow policy holders, in proportion to the present value of that certain mortuary interest involved in the transaction, which is technically known as the insurance value. Second, that as a portion of every premium, such as is in excess of what is needed for present insurance, is a self insurance deposit, the company is not justified by any commercial usage in imposing any tax upon this deposit beyond a reasonable charge for cost of collecting it. Third, that the remuneration of the agent should in no case depend upon the deposit of the premium, further than a reasonable allowance for compensation upon the mortuary risk assumed by the company.

The insurance premium in all whole life and endowment policies, after margin left off, called the net premium, contains two components, the insurance component and the reserve, the first of which is not required to be paid by the assured for death losses, according to some table of mortality, usually the English Table for Homans's American Experience; the other an over-payment which is necessary to be assessed for this purpose in the early years of the policy, when the death rate is relatively small, to provide in advance for the later years of the policy, when, by reason of the increasing age of the assured, his death liability will be greater and his share of this liability will be greater than the premium provided for. The fund thus created grows in the hands of the insurance company, first from yearly additions as the renewal premium is paid, and next from interest accumulations compounded year by year. The effect of the reserve is to work a gradual reduction of the company's risk, and in the event of the continu-

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ance of the person's life to the full term of the policy, to extinguish it entirely. The reserve, therefore, performs the office of an increasing self insurance deposit, as it takes off more and more of the amount of loss which the company would suffer if he were to die. It is therefore often called the self-insurance fund, for it must be borne in mind that each member's deposit with its accumulations is his own property, committed in trust to the company, for the special purpose of providing for the full payment of his policy when it matures by death or expiry. In the event of the discontinuance of the policy at any time before maturity, the holder of it has an equity of the same, which equity is known as the surrender value of the policy.

The following table, compiled for illustration from one of Wright's tables, presents all these elements in detail, in the case of a 10 year endowment policy, and, with the explanations subjoined, shows the action of the system in determining the premium margin of policies and their equitable surrender values :

## TEN YEAR ENDOWMENT—\$1000.

AGE, 30.—NET PREMIUM, \$84.53.—GROSS PREMIUM, \$88.23.

Age of the person.	Components of the amount insured, \$1000.		Age of the policy.	Components of the Gross Premium.			Modulus* of the system.	Surrender value computed from the modulus.		
	I.	II.		III.	IV.	V.		VI.	VII.	VIII.
	Reserve, or self-insurance.	Company's risk as reduced by reserve.		Margin.	The part that goes to the reserve.	Insurance cost corresponding to reduced risk.		Insurance values.	Surrender charge.	Surrender value.
30	—	\$919.18	0	\$3.70	\$77.08	\$7.45	\$37.53†	—	—	
31	\$80.19	835.86	1	3.70	77.63	6.90	30.64	\$2.45	\$77.19	
32	164.14	747.92	2	3.70	78.24	6.29	24.91	1.99	162.90	
33	252.08	655.77	3	3.70	78.91	5.62	19.53	1.56	250.00	
34	344.23	559.17	4	3.70	79.64	4.89	14.60	1.17	343.83	
35	440.83	457.86	5	3.70	80.44	4.09	10.18	.81	440.00	
36	542.12	351.61	6	3.70	81.32	3.21	6.40	.51	541.49	
37	648.39	240.09	7	3.70	82.29	2.24	3.35	.27	648.00	
38	759.91	123.00	8	3.70	83.36	1.17	1.17	.09	759.00	
39	877.00	.00	9	3.70	84.53	.00	.00	.00	877.00	
40	1000.00	—	10	3.70	—	—	—	—	1000.00	

The above is a fair specimen of all the 268 tables in Mr. Wright's volume, with this difference only, that in very long term insurance the two elements, cost of insurance and insurance values, increase.

\* The term Modulus is proper to be applied, on account of the importance of the "insurance value" as a factor in the new system.

† \$36.67 in the original table—a typographical error.

a few years before they begin to converge toward zero, most of the endowments the initial values are the largest. In any, which Mr. Wright calls endowment at death, or age of ceasing in these elements in a policy taken at the age of 32, do not reach its maximum until the age of 57, after which it begins; but in all endowments taken above the age of 29, starting at the age of 75, the convergence commences from the end of the policy. For this reason, and in order that the endowment value may always be used as the modulus of the margin, it might discourage insurances which run into the extreme of a man's life ordinarily ceases to have an insurable interest, and his tabular computations to endowments terminating, as a limit, at the age of 75 years.

Interpretation of the table is as follows: Column I. shows the insured person has contributed to his own insurance in any year of this policy—1st year \$80.19—5th year nearly one half of it—10th year \$1,000, or the whole of it does not imply that he has actually paid \$80, \$500, or \$1,000 of these sums, less the interest accruing in the meantime. Column II. shows the rate of reduction of the company's risk, caused by insurance accumulations in Column I. Column IV. shows the annual premium which are added year by year to the first column. Column V. is the mortuary assessment of the policy from year to year, and is the actuary's rate of interest each year, reduced by self-insurance so as to accord with the diminished risk carried by the company in Column II.

Numbers in Column VI., denoted "Insurance values," are the present values of all the mortuary costs of Column V., reduced to their present values from and after the several ages of the policy. The first or initial value, \$37.53, is \$7.45 in Column VII. increased by all the reduced values of those that follow in the column. The second value, \$30.64, is \$6.90, increased by the reduced values below it, and so on to the last, \$1.17, which is the exact mortuary cost of the terminal year of the policy.

The column of insurance values is the important one of the table. It shows the factors that are made use of to effect that which actuaries have before been able to achieve, the reduction of those values of life insurance which have heretofore been without the rule of mortuary valuation. The discovery is a great one, and small presently see, the results of it both in the margins and in the charges are widely different from those that have ever

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been attained under any arbitrary apportionment that has hitherto been employed.

The important function of determining the premium margins in accordance with the insurance element, is performed in the following manner :

Assuming 4 per cent. of the initial insurance value, the assumption being uniform throughout the system, the formula,

$$(1.) \quad zx_s + {}_sI_s + \frac{y({}_s\pi_s + zx_s + {}_sI_s)}{1 - y}$$

(in which  $z$  stands for .04,  ${}_sI_s$  for insurance value in a policy maturing at the age  $s$ ,  $y$  for .025, or  $2\frac{1}{2}$  per cent., for cost of collection)

and  $\frac{y}{1 - y} = \frac{.025}{1 - .025} = \frac{1}{39}$ ) gives the margin, and this added to the net premium as before described, gives the gross premium, which the following is the general formula :

$$(2.) \quad {}_sP_s = {}_s\pi_s + zx_s + {}_sI_s + \frac{y({}_s\pi_s + zx_s + {}_sI_s)}{1 - y}$$

To construct the margin for an insurance of any kind, proceed in formula (1.) take 4 per cent. of the initial insurance value at the given age and add thereto  $\frac{1}{39}$  part of the net premium, augmented by 4 per cent. of the insurance value aforesaid. Substituting the numbers given in the foregoing table in this formula, we have  $37.53 \times .04 + \frac{84.53 + 37.53 \times .04}{39} = 3.70$ , which is the margin in Column

III. of the above table. This added to the net premium, \$84.53, gives \$88.23 as the gross premium for a ten year endowment insurance of \$1,000.00 at the age of 30 years. Applying the same treatment to every age and every kind of policy, we form an entire set of margins founded upon the same mortuary principles that enter into all other mathematical processes connected with life insurance. If perfect exactness were aimed at, it would be necessary to compute the margin for each year on the basis of its own insurance value, but as the insurance values diminish annually, this would subject both the actuary and the policyholder to the serious inconvenience of a variable margin. To avoid this, Mr. Wright uniformly takes the initial value as the basis of the calculation, and remits the annual correction to the work of the actuary in parceling out the surplus.

bers in Column VII., called "Surrender charges," are ob-  
the simple process of taking 8 per cent. of the correspond-  
ce values in Column VI.; and these numbers in Column VII.  
from the corresponding numbers in Column I., the column  
give the surrender values in Column VIII. Thus the cir-  
cled, and the only lawless elements that have hitherto dis-  
insurance are made to submit to the reign of law.

er cent. assumption in this latter case, as also of 4 per  
former, is evidently arbitrary—it may be too high or too  
e room for error is very narrow, under any probable diver-  
ivate judgment, and in the event of error, it will be evenly  
d and must soon discover itself. No amount of misjudg-  
ver in these ratios can prevent the system from acting dis-  
and in accord with its dominant principles that the margin  
proportioned to the value of the mortuary risk assumed by  
ny, and that the surrender charges should decline and of  
surrender values advance as the mortuary values converge  
o, both of which principles are at variance with present

abulation will suffice to present to the eye the manner and  
e reform intended to be introduced into life insurance by  
's method of insurance values.

INSURANCE \$1,000.00—ACTUARIES' MORTALITY, 4 PER CENT.

Kind of policy.	Usual margins.	Insurance value margins.
ary life—death or 100	\$7.62	\$10.35
owment— " " 75	8.05	8.51
" " " 70	8.67	7.40
" " " 65	9.75	6.31
" " " 60	11.57	5.27
" " " 55	14.72	4.44
" " " 50	21.14	4.11

presents some striking differences in the two systems of  
ce economics. Whichever of the two may be right, the  
be exceedingly wrong. We note first that the insurance  
od reverses the order of the margins, diminishing them in  
the term of the policy shortens, while in the usual system,  
s increase as the term shortens.

in the next place that the new system imposes light mar-  
those policies which make the largest self-insurance depos-  
ne old system burdens them with heavy ones. Another

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point to be observed is that the present system draws by far the largest contributions to the current revenues from the very short policies, from which it results that the marginal income may be increased beyond reasonable demands, and all except the very long policy-holders are taxed enormously out of just proportion.

The bearing of the subject on the true method of compensating agents is too obvious to require particular discussion. What has been said will suffice to draw attention to it, and to show that the introduction of the new system is of such vital importance in its various relations to the economy of life insurance that every attempt to ignore the subject will prove abortive. It needs no extraordinary scope of knowledge to enable one to see that Mr. Wright's three questions are far reaching, and that he is fully justified in the assertion that "there is no problem in social science more worthy of thorough investigation than this."



#### CASES REPORTED.

The present number of the JOURNAL contains a full report of decisions in six insurance cases, besides that of *Price et al. vs. Phoenix Mutual Life Ins. Co.*, which is concluded from last number.

In *McBride et al. vs. The Republic Fire Ins. Co.*, decided in the Supreme Court of Wisconsin, the company refused to pay the loss on the ground that the plaintiffs, who were partners in business, failed to state in the application that they were joint owners of the property, while in fact the title was in one of them. The evidence showed that one of the plaintiffs informed the agent of the company, who made out the application, of the facts in the case at the time, and that the agent, without their knowledge, made an incorrect statement in the application. The court affirmed the doctrine in *Miner vs. The Phoenix Fire Ins. Co.*, decided in the same court, and reported in Vol. I. of this JOURNAL, and held that if the applicant states truly all the facts in respect to the title and his insurable interest in the property, and the agent inserts an incorrect answer in the application, either intentionally or otherwise, the mistake of the agent is the mistake of the company itself, for which the company is responsible. An agent of the company, soon after the loss, called upon the insured, and after having examined into the facts relative to the fire and the amount of the loss

that he could not recommend the company to pay the loss, based from their statements that they had sold more goods than had purchased. This the court held was a waiver by the assured of the right to demand proof of loss.

*Booley, administrator, vs. The Railway Passenger Assurance Company of Hartford*, was decided, on a second trial, in the Southern District of Illinois. The plaintiff, who held an accident policy in the company, having been on a railway train for a few moments at a depot, while attempting to get on board again, slipped and fell between the cars and

The company resisted payment of the insurance upon the grounds; among others, that his journey had terminated at the depot where he was killed, and that he was guilty of negligence in complying with the rules and regulations of the train. The court instructed the jury that the assured was only required to make himself acquainted with the general rules as to the management of trains which are presumed to be known to travelers, and that he was not to examine the time-card and ascertain all the minutiae of the management of the trains. The policy provided that the insurance should only extend to injuries received "while traveling in a public conveyance." On the former trial, 1 Ins. Law Journal, 800, the company insisted that the accident was not covered by the insurance because it did not occur in a public conveyance. The wording of the company's policies was formerly "while traveling in a public or private conveyance," as in the case of *North v. The Company*, 1 Ins. Law Journal, 46, and we understand the company endeavored to evade responsibility by substituting the word "traveling," but the court instructed the jury that if the accident occurred while the assured was either getting on or off the train, or while attempting to do so, for any reasonable purpose incident to railroad travel, the company was liable. The verdict was against the company in both trials.

*Washington Life Ins. Co. vs. Haney* was decided in the Supreme Court of Kansas. The suit was upon a policy issued by the company on the life of the plaintiff, upon the life of his wife. It was claimed that the statements made by her in the application, in regard to her health and her father's family, were untrue. The court held that any delay in the issue of the policy might have been made long after the application and the issue of the policy, could not be received in evidence as against the plaintiff to impeach the truthfulness of the application; that it is presumed that the answers in the application are true according to the de-

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gree and condition of truthfulness required by the application, that an insurance company may determine for itself upon what conditions it will make its contracts, and that it may lift any trivial important matter into an essential prerequisite and condition of contract.

In the case of *Young, administrator, vs. The Mutual Life Ins. Co. of New York*, the company resisted payment of the insurance upon the life of the deceased on the ground of forfeiture by non-payment of the premiums. The court held that the company transmitted the policy and receipts with knowledge that payments had not and would not be made at the office in New York, and could not be made elsewhere, in the mode required, until after due, and with an intent that the policy should be delivered and payment received by its agent, though it knew there must necessarily be a forfeiture under the strict letter of the contract, and that it had waived the forfeiture if there was any forfeiture under the circumstances. The case was tried in the United States Circuit Court for the District of California.

*The Life Association of America vs. The Board of Assessors of St. Louis County*, decided in the Supreme Court of Missouri, arose upon the question of the liability of the company for taxes assessed against it. The company claimed exemption under the State statutes. The court held that under the provisions of the State Constitution the Legislature had no power to exempt the company's property from taxation, or to commute the taxes upon it; that the act in question could not have the effect of exempting the company, and that it was liable for the payment of the taxes.

The questions arising in *The Security Ins. Co. of New York vs. J. H. Zell*, related to the amount of the company's liability on a quantity of high-wines destroyed while in the distillery warehouse, and before the United States tax had been paid. The court held that the insurer, the owner of the high-wines, was not liable for the payment of the tax, and that the company was therefore bound to pay only forty cents per gallon instead of ninety-nine cents, the value after the payment of the tax. The case was decided in the Supreme Court of Illinois. A part only of the opinion is given in this number. The remainder will appear next month.

CELLANEOUS.

BANKRUPTCY.

*Firemen's Ins. Co.*

ing syllabus of the opinion  
dget, delivered at Febru-  
1873, is taken from the *Chi-  
cago Tribune*, which contains the  
text:

COURT, N. DIST. ILLINOIS.

*Firemen's Ins. Co.*

and conditions of an insur-  
policy remain binding upon the  
insured after adjudication of bank-  
ruptcy to the same extent as before.  
The holder is bound by the  
terms of the contract.

An insurance company may  
not waive the performance  
of its policy, as the assignee has no such

proofs have been furnished  
and adjusted before adjudica-  
tion, the right and duty of the  
court to examine and revise such  
adjustment, and to call for  
proof if the claim is not clearly  
proved or there is any evidence of  
fraud or bad faith.

A policy limiting the right  
of recovery to one year from the loss is  
not a limitation, but proof of the  
bankruptcy is equivalent to  
the payment of a suit. Failure  
to make such proof or bring  
it forward, within the time limited,  
is as effectually as failure  
of the company were solvent.

It has been adjusted before the  
court in the petition in bankruptcy,  
and the settlement and  
the limitation clause.

Adjudication in good faith,  
can be proven without re-  
liance on the limitation clause in the

The proof was not submitted  
in the petition filed, the assignee  
is not entitled to an adjustment or agree-  
ment, which an action can be

A company while solvent may waive the  
proofs required by the policy, and  
where there is clear evidence of such  
waiver shown in the proof of debt in  
bankruptcy, the debt should be al-  
lowed, subject to the right of the  
assignee to make inquiry into all the  
facts touching such alleged waiver.

If the assured shows such waiver regu-  
larly made in good faith by the com-  
pany while it had the right so to do,  
the assignee should allow the claim,  
otherwise not.

The proper practice where the assignee  
wishes to contest any claim of the  
above classes is to ask that the claim  
be expunged under the 34th rule in  
bankruptcy.

LIABILITY OF INSURERS FOR BUILDINGS  
BLOWN UP AT THE BOSTON FIRE.

A committee, appointed by the adjust-  
ers of insurance companies interested  
in the Boston fire, applied to Judge  
Hoar of Boston, and Franklin Chamber-  
lin of Hartford, for legal advice in re-  
gard to the liability of the companies  
for loss and damage caused by the blow-  
ing up of certain buildings to prevent  
the spread of the conflagration. A num-  
ber of questions were submitted, the  
character of which will appear from the  
opinions of those gentlemen, given be-  
low.

OPINION OF JUDGE HOAR.

Upon the questions presented to me  
by the Committee of Adjusters of the  
insurance companies interested in the  
fire in Boston of Nov. 9th, 10th, and  
11th, 1872, for the purpose of obtain-  
ing a legal opinion, I have, after due  
consideration, formed the opinion which  
is subjoined.

The first three questions relate to the  
liability of the companies for losses on  
buildings and their contents, when the  
buildings were "blown up" designedly  
by the municipal authorities, or by per-  
sons engaged in stopping the spread of  
the conflagration, by means of gunpow-

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der ; and they include the cases where the fire did not reach the building which was blown up ; where the fire reached it, but was stopped by it ; and where the fire reached it, destroying what remained of it, and extended beyond it.

I am of the opinion that, under the law of Massachusetts, there is no distinction between these classes of cases in respect to the liability of insurers against loss or damage by fire, and that the companies which have insured against such loss or damage, without any special stipulation for exemption from liability, are responsible for the loss under either of the circumstances recited.

In the case of *Scripture vs. The Lowell Mutual Fire Insurance Company*, 10 Cushing, 356, the subject was elaborately considered and adjudged by the Supreme Court of Massachusetts. That was a case in which a cask of powder was carried by a boy into the attic of a building, and there exploded, burning the room and its contents to some extent, and also blowing off the roof. The court held that the insurers against loss by fire were liable for the damage by explosion merely, as well as for that which was caused by combustion. They decided that the burning of gunpowder was such a fire as was covered by the insurance ; and that the damage caused by the expansive force of the gases generated by the combustion of the powder was a damage by fire.

This decision I think conclusive upon the law of Massachusetts, and have no doubt that it will be adhered to in the courts of that State. Indeed, it appears to be substantially in conformity with the doctrine held by the courts of other States and of the United States, and of the best text-writers upon the subject. The authorities are cited and commented upon by Judge Cushing, in the opinion above referred to. See 11 Peters, 225 ; 21 Wendell, 367 ; 14 Missouri, 220.

This conclusion is supported, on principle, by another reason stated in *Slips on Insurance*, § 1098, that subject is, by the direct effect of the peril insured against, put out of the control of the assured." It is on this ground that the insurers are held liable for injury to the property insured, caused by removal or plunder during a fire.

The fourth question is not so readily answered, as it involves some other conditions. Whether the insurers are liable for the injury done to a building and its contents by the blowing up of an adjoining building, the whole injury being caused by the explosion, and no fire ensuing, must be decided by fixing the "proximate cause" of the loss. I have not found an express adjudication on this point, though it is adverted to in the case in the 10th of Cushing. I am of opinion that, if the injury is caused by the direct force of the explosion, the blowing down a wall, or bursting in windows, it comes within the principle already stated, and that the insurers are liable. If the injury were caused by missiles shot off by the explosion, and impinging against the building insured, or falling upon the roof, it is a doubtful question, perhaps depending for an answer upon the closeness of proximity, and would require a statement of the exact circumstances. It would seem to me a fair subject for amicable litigation or compromise.

It will be observed that in answering these questions I have made no special observation upon the point that the "blowing up" was caused designedly and with the intent to destroy the building insured, for the purpose of checking the spread of a conflagration, and saving other buildings. In my judgment this is wholly immaterial. If the insurers are responsible for the consequences in case the powder is accidentally ignited in the building, they would be equally responsible if it were placed in the bu-

fire to by an incendiary, or person designedly and with a view to it, if it was not done by the act or procurement of the assured. The question is, whether the contract is of a kind that it is included in the contract of insurance against damage by fire. How such a fire of no consequence unless the insured is responsible for its occurrence, unless there is some exception to the rule which varies the contract. The question needs no further question of law, than what is the opinion already expressed, and relates only to a matter of fact. If the companies pay the loss which they are liable, they are not entitled to the right to be subrogated to the rights of the assured, to the extent of the loss, in claiming and exacting compensation given by statute against the fire; or against persons who are liable by whose authority the building is blown up, if their action is conformable to law as to property. Whether any advantage is gained by waiting to have this question decided by the insured, before the companies, if that is the case, I cannot determine. It seems to me to make much difference. The payment of the loss by the companies constitutes an assignment of the rights of the insured to third parties, and this will be protected by the law, allowing the companies to sue the insured. *Hart vs. New England Railroad Company*, 13

My first question I should reply to seem to me extremely proper to the receipts given to the insured on the payment of losses amounting to them the rights of the insured to indemnity for the same as all other persons and corporations. It would seem a proper pre-

caution to avoid controversy, though it would not be essential to the vesting of the right, which is created by operation of law. I enclose a suitable form, as requested, though any form to express the idea would be sufficient.

My opinion has so far been given upon an insurance against loss or damage by fire generally, without any exception in the policy of damage by explosion which would apply to an explosion caused by gunpowder. In the policies of the Hancock Fire Insurance Company of New York, the Imperial Fire Insurance Company of London, and the North British and Mercantile Insurance Company of London and Edinburgh, which have been shown to me, there are clauses of exception of liability for losses by explosion, which modify the liability of the companies to holders of such policies.

E. R. HOAR.

New York, December 16, 1872.

OPINION OF FRANKLIN CHAMBERLIN, ESQ.

HARTFORD, CONN., Dec. 19, 1872.

DEAR SIR: My severe sickness at Brooklyn has prevented an earlier reply to your correspondence.

Your first question is:

Are insurance companies liable if a building was blown up and the fire did not reach it?

Independently of authorities, I should incline against the opinion that an insurance company is liable for a building purposely and properly destroyed by civil authorities to stop the progress of a fire.

I should not think it damage "happening" to the property; and not within the intent or thought of the parties in the making of the contract.

The blowing up of a building by an unauthorized person seems to be covered, in Massachusetts, by the case of *Scripture vs. Lowell*, 10 Cush., 356, in which it was held that, for such destruc-

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tion, insurers would be liable. In that case the gunpowder took fire without fault of the assured, and burned the building and its contents.

The case differed in some very material respects from this one.

I do not know that the precise question arising here has been decided in Massachusetts, or by any court whose decision would be controlling in the courts of that State, but in New York, in *City Fire Insurance Company vs. Corliss*, (21 Wendell, 367,) the court held that goods insured, and which were destroyed by the blowing up of the building by order of the municipal authorities to arrest the progress of the great fire in New York, and to save it and others from being burnt, were within the protection of the policy and to be paid for. The language of the judge (Bronson) who delivered the opinion there is very broad; he says, "It matters not how the flame was kindled, *whether it be the result of accident or design*—whether the torch be applied by the honest magistrate or the wicked incendiary—whether the purpose was to save a city, as at New York, or a country, as at Moscow—the loss is equally within the terms of the contract."

The same result has been reached by some other State courts, and a case somewhat analogous to the one in Massachusetts has been decided by the Supreme Court of the United States adversely to the insurers.

The cases are against us, but I do not feel sure that the Supreme Court of Massachusetts, or of the United States, would follow the extreme views taken by Judge Bronson, and I should contest a case in which the fact was as indicated by the first question. Indeed, I do not know of a case adverse to us in which the fire did not reach the building, or else was arrested by the blowing up.

Second, you ask

Are we liable if the building blown up and the progress of the stopped thereby?

I do not think you ought to be, if the destruction was under a statute, by duly authorized authorities, and deliberately and rendering the city liable to the owner, as the Massachusetts statute does.

I think it is substantially a case in which the property has been appropriated to the uses (protection) of the public, under a statute directing the proceedings and the compensation; not a case in which damage has "been done" by means of a fire, within the meaning of the policies.

Here, as I have stated, the cases are against us, and the text-books are against us, but I should contest it, and see what will be the decision of the Supreme Court of Massachusetts, or, if action brought in United States Court, in the Supreme Court of United States.

Third. Are we liable if the building was blown up, and the fire reached the contents, and destroyed all that remained of it, and then went beyond it?

For what the fire reached and destroyed, you would be liable at its value when reached and burned; beyond that I should answer this as the second.

Fourth. Are we liable if a building and its contents was injured by the blowing up of an adjoining building, but no other destruction than that caused by the explosion, no fire having ensued?

This damage, as I understand the question, would be the result of concussion; for that you would not be liable, I think.

Fifth. What are our legal duties to the assured; shall we decline payment and act on the defensive; or shall we make payment and commence suit against the parties instrumental in causing the loss?

I should defend; as I am of opinion that that would be the shortest and most

mode of settling the question that is what all parties desire.

desirable, I should think, counsel should have consultation before you take final action that Judge Hoar can judge. to Boston for that purpose is desirable, and will name place, when and where it will to him.

that I have not more time news, I am yours, very truly,  
F. CHAMBERLIN.

#### FE INSURANCE.

writer, speaking of life insurance: "It is, undoubtedly, the pauperism. If that day that sees the people of England oppressed with the value of a deadly blow will be dealt and the necessity for the instead of children being streets to beg, steal, and at the bar of our criminal should see them provided ed to a decent means of instead of widows dying or dragging on an agony at slop-work, on a few we should see them super-training of their children ns. Instead of young girls by hard necessity to a life should see them qualify- s to be worthy wives and achieving their independ- ns of the pecuniary aid a life policy. Pauperism ould be minimized, mechan- developed, trade flourish, disseminated in a fertilizing always just where needed t, no limits can be placed ial results of a sound sys- urance."

#### STEAM BOILERS.

The Hartford Steam Boiler Inspection and Insurance Company makes the following report of its inspections in the months of October and November, 1872: During these months there were 2,217 visits of inspection made, and 4,162 boilers examined. 3,922 externally, and 1,411 internally; while 373 were tested by hydraulic pressure. The number of defects in all discovered were 1,981, of which 403 were regarded as particularly dangerous. These defects were as follows: Furnaces out of shape, 102—23 dangerous. Fractures, 202—89 dangerous. Burned Plates, 138—52 dangerous. Blistered Plates, 267—35 dangerous. Sediment and deposit, 420—25 dangerous. Incrustation and Scale, 383—45 dangerous. External Corrosion, 145—21 dangerous. Internal Corrosion, 55—7 dangerous. Internal grooving, 22—3 dangerous. Water Gauges defective, 123—19 dangerous. Blow-out apparatus defective, 32—8 dangerous. Safety Valves overloaded, 59—29 dangerous. Pressure Gauges defective, 235—33 dangerous. These varied from —10 to +20. Boilers without Gauges, 145—25 dangerous. Cases of Deficiency of Water, 19—12 dangerous. Broken Braces and Stays, 49—34 dangerous. Boilers worn out and beyond repair, and condemned, 31. Many of the defects enumerated above come from neglect on the part of the boiler attendants. The boilers are blown down under heavy pressure, or, having been blown down are filled up immediately with cold water, and bad fractures are caused. Some boilers have been found set with the minimum water line below the fire line. Theoretically there is but one *water line*, and practically it should be the same; but we not unfrequently find water carried at different heights in the same boiler. The water gauges, or try-cocks, should be so arranged that water

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discharging from the lower one indicates a sufficient height above the fire line to thoroughly protect the sheets from overheating. Boilers should be cleaned often. The accumulation of mud and various kinds of deposit renders the boiler liable to be badly burned. There are many "little points" that must be observed, if safety and economy are to be attained. "Little things" neglected often lead to great disasters.—*N. Y. Mercantile Journal*.

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### ITEMS.

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The comparative progress of life insurance in the United States and in Germany is illustrated by the following figures :

	Germany.	United States.
Population.....	40,000,000	40,000,000
Insurable lives.....	10,000,000	9,000,000
Insured lives.....	700,000	1,100,000
Amount insured.....	\$400,000,000	\$2,650,000,000
Average on each life	\$570	\$2,400

Negroes not included.—*N. Y. Mercantile Journal*.

Lord Mansfield was sitting for his portrait; Sir Joshua Reynolds asked him his opinion, if he thought it was a likeness; when his lordship replied that it was totally out his power to judge of its degree of resemblance, as he had not seen his own face in any looking-glass during the last thirty years of his life; for his servant always dressed him, and put on his wig, which therefore rendered it quite unnecessary for him to look at himself in a mirror.

It is said that the case of Lord Cochran, afterward Earl of Dundonald, almost broke the heart and hastened the resignation and death of Lord Ellenborough. That great man and most up-

right magistrate had conceived a cal prejudice against Lord Cochran summed up violently against him afterward saw good reason to believe had been mistaken in his facts, and been too harsh in his sentence.—*Law Journal*.

LORD MEADOWBANK.—Mr. T. Walker Baird was, in a dull technical way, stating a dry case to his lord who was sitting single. This displeased the judge, who thought the dignity required a grander tone. He dismayed poor Baird, than whom no man could have less turn for burning the forum, by throwing himself back in his chair, and saying—"Declain, why don't you declaim? Speak to us as if I were a popular assembly!"—*Cockburn's Memorials*.

Hon. William H. West, Associate Justice of the Supreme Court of Ohio, resigned that office.

The Republic Life Ins. Co. of Chicago have reinsured the policies of the California Mutual Life Ins. Co.

A case was being tried before a jury bytery not long ago, when the counsel for the defendant urged the plea of moral insanity. A venerable presbyter rose and said: "Mr. Moderator, the case of moral insanity seems to me to be identical with what the older theologians in their unscientific way called depravity."

It is one of the finest problems of legislation what the State ought to do upon itself to direct by public wisdom and what it ought to leave, with as little interference as possible, to individual discretion. Statesmen ought to know what belongs to the laws and what nations can alone regulate.—*Burke*.

## CURRENT TOPICS.

received transcripts of de-  
following cases :

*s. The Great Republic Ins.*

Supreme Court, Mo.

*Co. vs. Cooper.*

Supreme Court, Ill.

*o. vs. Wheeler et al.*

Court of Appeals, N. Y.

*railway Passenger Assur-*

*J. S. C. C., S. Dist. Ill.*

*Administrator, vs. The Mut.*  
N. Y.

U. S. C. C., Dist. Cal.

*Administrator, vs. The Cove-*  
*Ins. Co.*

Supreme Court, Mo.

*the Metropolitan Ins. Co.*

Court of Appeals, N. Y.

*Ins. Co. vs. Farrell.*

Supreme Court, Ill.

*ax, Esq., Secretary of the*

*Mutual Life, will accept our*

*pellant's brief in the case*

*Mut. Life Ins. Co., appel-*

*lath, appellee, now pend-*

*Court of Alabama.*

*nder obligation to B. D.*

*t. Louis, attorney for the*

*transcript of the judge's*

*case of Tooley, administra-*

*ry Passenger Assurance*

*son of Missouri recently*

*liam Selby as Superin-*

*Insurance Department of*

*place of Mr. Sells, whose*

*red. Mr. Selby is a son*

*ident of the St. Louis*

*ns. Co., and it is under-*

*nce circles that the nomi-*

nation was secured by the influence of that company, who are supposed to be in need of a friend at court. The nomination was looked upon with extreme disfavor in that State, not only because of Mr. Selby's comparative ignorance of insurance and insurance business, but it was felt that there were some things in the history and management of the St. Louis Mutual that should be brought under the scrutiny of a competent and unbiased officer. Mr. Selby's nomination was rejected in the Senate without debate, and by a large majority. It is to be hoped that Gov. Woodson may now be at liberty to make a nomination free from the influence of any specially interested party.

—Hon. Isaac P. Christy of Michigan was unanimously renominated by acclamation as Judge of the Supreme Court of that State, by the Republican State Convention, on the 26th ultimo.

—The case of Hillyard et al. vs. The Mutual Benefit Life Ins. Co., reported in the February Number of the JOURNAL, has been appealed to the Court of Errors and Appeals of New Jersey.

—The Globe Mutual Life Insurance Company of New York has ceased to be globular—at least so far as Kentucky is concerned. It appears that it has withdrawn its business from that State, under circumstances that, in the opinion of the Insurance Commissioner, Hon. G. A. Smith, require official notice. In November, 1871, the Commissioner notified the company of a discrepancy between their "registry of policies," in force December 30, 1870, and their "certified statement" of the same date; the difference being 179 policies, or \$300,823.52, insurance. As the valuation of the policies is made from the registry list, and as the certified statement indicated an additional liability for the net value of the 179 policies, the

ST. M. L. I. CO. v. HILLYARD ET AL.

department deemed it essential that an exact description of all policies should be filed at the earliest practicable date.

The correspondence between the Insurance Bureau of Kentucky and the company resulted, according to the communication of the Commissioner, recently made to the State Auditor, in the admission that the company had "marked off," before the time had expired within which the full-paid insurance could be claimed, \$148,000 (net value, Kentucky computation) worth of policies. Authorized by the Kentucky statute, the Commissioner applied at the home office of the company to investigate its affairs. Free access to the books and records, saving the cash-book, was had. That worthy volume was too sacred to be profaned by a Kentucky official. After a few hours' consideration, the Globe Board of Trustees concluded the investigation was too discursive, and requested the investigator to return "all copies" of books, etc., made by him. A refusal of this was followed by the withdrawal of the company from Kentucky.

It seems, however, the Commissioner saw a good deal during the "few hours," and he is anxious others should see also. On the 1871 business a 34½ per cent. dividend on the full paid capital of \$100,000.00 had been voted, which, with \$61,500.00 previously voted, made "the stock stand on the company's books \$196.00 for \$100.00 original."

As the annual report of the Commissioner shows but \$16,000.00 net surplus, and as the charter of the company allows but 20 per cent. of the net surplus to be set aside for stockholders, and as Mr. Freeman had informed the Commissioner that "himself and family owned more than half of the capital stock of the company," the Commissioner not only concludes that it is easy to understand why and how these generous dividends are declared, but that it is also clear that somebody's rights are be-

ing encroached on. The Commissioner further states that in 1871 Pliny man (individual) gave a \$60,000.00 mortgage to the company. It made a showing in Massachusetts. Pliny man (president of the Globe) never able to pay the fee for recording mortgage, and early in '73 Pliny (individual) received it back canceled concerning this, President Freeman Commissioner Smith it was none of his business.

In the Globe's Book of Minutes, credit is "arrogated for inaugurating and maintaining the broad principle of non-forfeiture in life-insurance." "marking off" business above referred to, and the clause in the company's charter providing for the forfeiture of policies, discover, in the Commissioner's view, the meaning and scope of "broad principle."

The communication concludes with a request that all licenses issued to Globe's agents in Kentucky be revoked.

—Hon. John A. Jameson of Chicago, Chief Justice of the Superior Court of Cook County, is spending the winter in Vermont, recruiting his health, which has become impaired by the arduous duties of his office.

—A Detroit negro prisoner, on his way to the Penitentiary for larceny, asked what he thought of his trial. He said: "When dat lawyer dat fended me made his speech, I thought shuah I was going to take my ole hat and walk out of dat co't room; but when de ole lawyer got up and commenced talking, I knew I was de biggest rascal on de earf."

—"Are dose bells ringing for st. Peter?" inquired Simon of Tiberius. "No, dey are not," answered Tibe, "dey are ringing for plenty of fire, and de bells am ringing for water."

THE  
INSURANCE LAW JOURNAL.

MAY, 1873.

No. 5

DIGEST OF DECISIONS.

INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

*From certified transcript in our possession.*

APPLICATION.

**FIRE.**—*Misstatements in—Incendiary Danger.*—The insured in the application that there was no incendiary danger to the property threatened or apprehended. *Held*, that there was any incendiary danger fairly and reasonably to be apprehended, which was known to the insured, it was their duty to state in the application and inform the agent of it, and that by answering falsely in that regard, it would relieve the insured from liability, but the danger must be real and substantial, and one which a man of ordinary prudence and caution would apprehend, and not mere idle talk or reports.

*et al. The Republic Fire Ins. Co.\**

p. 270.

WIS. S. C. 2

**FIRE.**—*Misstatements in, by Company's Agent.*—The application upon which a policy was issued, was made out by the

rendered November 26th, 1872. To appear in 26 Wis.

ST. M. O. D. AM L. B. COPY



agent of the insurance company, and contained an untrue statement in regard to the title of the property insured. *Held*, "if the applicant states truly all the facts in respect to the property and his insurable interest in the property, and the agent in giving an incorrect answer in the application, either intentionally or otherwise, there is no reason for holding that the assured is bound by it. In such a case the mistake of the agent is the mistake of the company itself, and the assured is not estopped from showing the falsity of the statement contained in the application. This doctrine in effect has been recognized and enforced in a number of cases which has come before this court."

*Miner vs. The Phoenix Ins. Co.*, 27 Wis., 693, [1 Ins. Law Jour'l, p. 693] and the authorities there cited.

*McBride et al. vs. The Republic Fire Ins. Co.*

#### CONSTRUCTION.

§ 67. *LIFE*.—"Rheumatism"—"Disease"—*Ambiguous Questions in Application*.—The application, upon which the policy was issued, contained the following question, which was answered by the person whose life was insured: "Has the party ever been afflicted with any of the following diseases? (naming several, and among others, rheumatism.) Answer—Never." There was evidence on the trial below tending to show that prior to the application the assured had sub-acute rheumatism; that sub-acute rheumatism is not the "disease" of rheumatism in the ordinary understanding of the term, and also evidence tending to show that technically, and in medical parlance, sub-acute rheumatism is the disease of rheumatism. *Held*, that "the rheumatism referred to in the question is the *disease* of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism, is not comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue, or the extracting of a tooth is the *disease* of "spitting of blood," mentioned in the same question. The life insured had the right to answer the question upon the basis that its terms were used in their ordinary signification. If there was any ambiguity in the question, so that the language was capable of being construed in an ordinary, as well

nical sense, the defendant can take no advantage from unity."

Hampden F. I. Co., 4 R. I., 159 ; Flanders on Insurance, 225.  
vs. *Phoenix Mut. Life Ins. Co.*\*

253.

MINN. S. C.

ACCIDENT.—*Of Policy.*—"Due Diligence for Self-protection with Rules and Regulations of Carriers"—*Judge*—The defendant issued two policies to the assured, by each of which he agreed to pay \$3,000.00 in case of his death without fault from the date thereof. The policies contained the following clause: "Provided always that this insurance shall not be void in case of death resulting from an injury sustained by the insured while accidentally received by the insured while acting as a conductor on a public conveyance provided by common carriers for the transportation of passengers in the United States or the Dominion of Canada, and in the compliance with the rules and regulations of such carriers, and not neglecting to use due diligence for self-protection." On the next day after obtaining the policies the assured took the railway train from Chicago and proceeded to Kankakee, where the train arrived shortly after seven o'clock in the evening. After getting on the train the assured went to the station, where he remained for several minutes and taking in water, the train started; the conductor signaled with his light, and the train moved slowly to the coal-bin to take in coal, which was the last stop provided the entire train went beyond Kankakee. When the train stopped at the station the assured with others left the train. When it started he walked rapidly from the door of the rear car, where he was standing, going along the platform of the rear car, and past the back platform of the rear car, until he reached the train, when he extended his hands to grasp the side of the car and slipping, fell in front of the rear car, which passed over him and he was killed. There was evidence that when the train started some one remarked that the bell was ringing, and a person near the station-house called out to him as he was going to the cars that the train was only going to coal-up and that it turned round as if he heard the call. *Held*, that it

entered 1871. To appear in 16 Minn.

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v. Minn. S. C.  
111  
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was the duty of the assured "to use that degree of caution diligence which a prudent man would use under the circumstances in which he was placed." Whether the assured in attempting to get upon the train did use such a degree of caution diligence, is a question for the jury. *Held*, also, that "the meaning of the clause was that the traveler should only make himself acquainted with those general rules as to the management of trains and the conduct of railroads, which are presumed to be known to travelers under these circumstances." The assured was not obliged when he went on the train "because of the clause in the policy to examine the time-card and ascertain all minutiae connected with the management of the trains."

*Tooley, administrator, vs. Railway Passenger Assurance Co.\**

Rep'd Jour', p. 275.

U. S. C. C. DIST.

§ 69. ACCIDENT.—*Of Policy*—"Traveling in a Public Conveyance."—The defendant issued two policies to the assured, by one of which it agreed to pay \$3,000.00 in case of his death within two days from the date thereof. The policies contained the following clause: "Provided always that this insurance shall extend to bodily injuries, fatal or non-fatal, as aforesaid, which are accidentally received by the insured while actually traveling in any public conveyance, provided by common carriers for transportation of passengers, in the United States or the Dominion of Canada, and in compliance with all rules and regulations of such carriers, and not neglecting to use due diligence for self protection." On the next day after obtaining the policies, the assured took the railway train from Chicago to Kankakee. Upon reaching Kankakee, the train stopped at the station for several minutes and the assured with others left the cars. When the train started, in attempting to get on board he slipped and fell in front of the rear car, which passed over him and he was killed. There was evidence tending to show that his journey terminated at Kankakee. *Held*, that under the conditions of the policy, "The assured must have been actually a traveler in or upon the train; it cannot be said that the responsibility ceased whenever he stepped out of a car to alight at a station, and that it never

\* Decision rendered January 29th, 1873.



ative again until his foot entered the car to resume his That would be giving too narrow a meaning to the the policy. We think that the fair construction of ty assumed by the defendant in this respect was, that it njuries received by Tooley while necessarily getting on train as a traveler upon it." He was not bound to re- le the car all the time. *Held*, also, that "if his jour- d at Kankakee, then it cannot be claimed, under the d facts of this case, that the defendant would be liable, on the assumption that he was going no further than , in attempting to get on the train as he did, it was at sk."

*Administrator, vs. Railway Passenger Assurance Co.*

—§ 68.

LIFE.—"*The Family Physician of the Party.*"—The n, upon which the policy was issued, contained the question, which was answered by Richard Price, the ose life was insured: "Name the residence of the fa- ician of the party, or of one whom the party has usu- oyed or consulted. Answer—have none." At the time ation was made, the family of Richard Price consist- self, his wife, and two or three children. *Held*, that wver is, in our opinion, a positive denial that the life in- a family physician. The phrase 'family physician' is n use, and has not, so far as we are aware, any techni- cation. As used in this instance, and for the purposes timony appearing in this case, the chief justice and e of opinion that it may be sufficiently defined as sig- e physician who usually attends, and is consulted by ers of a family in the capacity of a physician." "We t a person who usually attended, and was consulted by and children of Richard Price as a physician, would ily physician of Richard Price in the meaning of the th interrogatory, although he did not usually attend as not usually consulted as a physician by Richard self."

*Id. vs. Phoenix Mut. Life Ins. Co.*

—§ 67.

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§ 71. LIFE.—“*Gastritis*”—“*Severe Sickness or Disease*.” In the application, upon which the policy was issued, the following question was asked and answered by the person upon whose life the policy was issued: “Has the party had, during the last seven years, any severe sickness or disease? Answer, No.” The answer of the defendant charged that the insured had, within seven years, *chronic gastritis*. There was evidence in the court below to show that he had had gastritis. *Held*, that “unless chronic gastritis and gastritis are synonymous, to which there is no judicial presumption nor testimony, evidence was not within the issues, so that the false representation charged was not proved. In addition to this consideration we are not free from doubt as to whether gastritis was shown to be ‘a severe sickness or disease.’ We can take no judicial cognizance of its character.”

*Price et al. vs. Phoenix Mut. Life Ins. Co.*

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§ 72. MARINE.—“*Dunnage*”—“*Merchandise—Cargo—Warranty*.”—The policy upon a ship, on a voyage from Liverpool to San Francisco, contained the clause, “Warranted not to load more than her registered tonnage, with lead, marble, slate, copper-ore, salt, stone, bricks, grain or iron, either or all, on any one passage.” The registered tonnage was 1,285 tons, and the vessel took on board 1,064 tons of iron, six tons of brick, and 238 tons of cannel coal, being an excess over the registered tonnage of 23 tons. The charterer agreed to pay 51 shillings per ton for the freight put on board, and the master agreed to furnish 23 tons of cannel coal, as dunnage, and under the agreement did furnish 238 tons, which was placed along the ship’s bottom as dunnage. For this a bill of lading was signed; it was placed on the freight-list, and freight was collected for it at 51 shillings per ton. The ship sustained a partial loss on the voyage. *Held*, that the law makes the implied qualification that ballast and dunnage shall not be regarded as lading, within the contract. *Held*, also, that “the evidence justified and required the instruction asked by the plaintiffs, namely, that if freight was received and paid for the coal, it was cargo, and came within the warranty. Here was an admitted fact, which gave character to the article, stamping it as merchandise.” *Held*, also, that “wh



is used in lieu of dunnage, or to perform the office, it does not lose its character as cargo." *Held*, also, company were entitled to the benefit of those results mutual self-interest of the parties would lead them to the company made their contract in view and in anticipation of these considerations."

*Western Ins. Co. vs. Thwing.\**

1900.

U. S. S. C.

### PAYMENT.

*ACCIDENT.—Of Loss—Time for.*—The policies required payment of loss or damage, but contained no provisions in regard to proofs of loss or damage, or the time within which payment could be made. *Held*, that it was the duty of the company to pay within reasonable time after notice, and that interest was payable from the expiration of that time.

*Administrator, vs. Railway Passenger Assurance Co.*

—§ 68.

### POLICY.

*LIFE.—Avoidance of—Non-payment of Premium—Forfeiture—Authority of Agent.*—The assured, on the 1st of June, 1867, applied to the general agent of the company in San Francisco, for a policy of insurance upon his life, giving \$1000 payable in 60 days, for the premium, and taking from the agent a memoradnum, by which the payment of the premium was deferred, and by which it was agreed that the policy should be in effect from the date thereof, provided the application was accepted by the company. The application was accepted, and a policy, bearing date April 5th, was sent to the agent from the company, and was received by him about the second of August. The consideration recited was \$96.60, paid by the assured, and the payment of a like sum on or before the 6th of April, July, October, and January of each year, and the policy was issued and accepted "upon the following express

dated March 18th, 1872..

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conditions and agreements," among which were: "Second the said premiums shall not be paid on or before the days as mentioned for the payment thereof, at the office of the company in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, then, in every such case, the said company shall not be liable for the payment of the sum assured any part thereof, and this policy shall cease and determine." Attached to the policy were two receipts, signed by the proper officers, dated at New York April 6th and July 6th, respectively, purporting to be for the premium for the two quarters commencing at their respective dates. These receipts were countersigned by the agent at San Francisco, on the 2nd of August, and on the 8th of August, by his clerk, he wrote the assured at Vallejo, California, that his policy had arrived, and asked whether he should send it or if he would call and get it when he was in the city. It was not shown on trial that this letter or any other note was ever received by him, and no payment was ever made on the note or any premiums. The assured was shot at Vallejo and died from the effects of his wounds on the 20th of September, 1867. After his death, the agent sent the policy to the home office, where it was canceled on the 31st of October. *Held*, that "it is elementary law that forfeitures are not favored, and that provisions for forfeiture must be strictly construed. The authorities also hold that these principles are applicable to forfeitures in insurance policies; that the provisions for forfeitures are inserted for the benefit of the companies, and may be waived by them; and that the courts will find a waiver on slight evidence."

Ripley vs. *Ætna Ins. Co.*, 29 Barb., 557; Goit vs. *National Protection Ins. Co.*, 25 Barb., 189; Baker vs. *Union Life Ins. Co.*, 6 Robt., 394; Cohen vs. *Williamsburg Ins. Co.*, 35 N. Y., 131; Bouton vs. *American Life Ins. Co.*, 25 Conn., 542; Pino vs. *Merchants' Mut. Ins. Co.*, 19 N. H., 214; *Insurance Co. vs. Webster*, 6 Wal., 129.

*Held*, also, that the company transmitted the policy and receipts with knowledge that payments had not and would not be made at the office in New York, and could not be made elsewhere in the mode required until after due, and with an intent that the policy should be delivered and payment received by its agent.

knew there must necessarily be a forfeiture under the of the contract. *Held*, also, that the act of the agent the note to the assured on the 8th of August, after e, if any there was, recognized the agreement as be- force. *Held*, also, that "the several acts of the defend- its acts, and the acts of its officers in relation to the vrn to the court, which were performed subsequently ing of the forfeiture, if any accrued, treat the agree- insurance as still in force. They affirmatively indicate n not to insist upon a forfeiture," and that "upon e court must find a waiver of any forfeitures which d, and that under the circumstances, after the death ed it was too late for the first time to insist upon re."

*Administrator, vs. The Mutual Life Ins. Co. of New York.\**

289.

U. S. C. C., DIST. CAL.

**LIFE.—Ownership of—Insurable Interest of Wife.**—The 1853, issued a policy upon the life of the assured, ded that the amount of the insurance should be paid , Amanda, or her legal representatives. The wife ed in 1856. The assured, who had paid the pre- tinued to pay them until 1860, when, having remar- cured a memorandum upon the policy, that it should e benefit of his then wife and others named. After the premiums until 1868, when he died. *Held*, that s a direct interest in the life of her husband, and such as will sustain a policy in her favor upon his life. was valid, and had the assured died during the life of , it could have been enforced.

Phoenix Ins. Co., 28 Mo., 383.

that the policy was taken out by the husband for the securing the support of the wife after his death, but oeing lost, he was not bound to continue the policy efit of her representatives. He had the right, with of the company, to change the beneficiaries, and ev-

entered January 20th, 1873

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ery payment made after the change was in the interest of present wife.

Kerman vs. Howard, 23 Wis., 108.

Gamb vs. The Covenant Mut. Life Ins. Co.\*

Rep'd Jour'l, p. 338.

#### PRACTICE.

§ 76. LIFE.—*Questions of Fact.*—In a suit upon a policy the court below no instructions were given and no exceptions were taken to any ruling of the court. The facts were admitted upon the record. *Held*, that this court must pass the legal effect of the facts. "It is only where they are disputed and there is evidence tending to sustain the claim of each party that the losing one is concluded by the finding in the court."

Gambs, Pub. Adm'r vs. The Covenant Mut. Life Ins. Co.

§ 77. LIFE.—*Action by Guardian ad litem—Statute.*—The policy was issued upon the life of the assured to his wife and for her benefit, and provided that in case of her death before the death of the assured, the amount of the assurance should be payable to their children for their use, or to their guardian if under age. The wife having died before the husband, the action was brought by the guardian *ad litem* of the minor children, duly appointed to prosecute the same. Upon trial in the court below, the defendant insisted that the action should have been brought by the general guardian of the children. *Held*, that in admitting that the guardian named in the policy is the general guardian, while the provision of the policy makes it the privilege and duty of the company to pay the sum assured to the guardian, it does not follow that the action must be brought in his name. The children are the real parties in interest, therefore the action is under the statute, well brought by them in their own names, they appearing by a guardian *ad litem*. Even if the general guardian be regarded as a trustee of an express trust, the statute authorizing such trustees to bring

\* Decision rendered April 29th, 1872.

their own names, is not imperative but permissive in

*vs. Phoenix Mut. Life Ins. Co.*

—§ 67.

## PROOFS OF LOSS.

*RE.—Waiver of—Certificate of Magistrate.*—After the death of the company, which had issued a policy upon which the insured had destroyed, went to the place where the insured resided, told them he had come to take proofs of loss, but after being examined into the facts relative to the fire and the property, told them he could not recommend the company to pay the loss, as it appeared from their statements that they had sold more goods than they had purchased. *Held*, that the production of proofs, under such circumstances, was of no value to either party, and the law rarely, if ever, requires observance of an idle formality, especially after the insured has received the benefit the original stipulation was made had no conformity thereto unnecessary and practically superfluous.

*New York Transportation Co. vs. Western Mass. Ins. Co.*, 1857, and authorities cited.

that "for a like reason all necessity for producing the proofs of the magistrate was obviated by the position of the insured that it was not liable for the loss."

*al. vs. The Republic Fire Ins. Co.*

—§ 65.

## RESIDENCE.

*ACCIDENT.—Misstatement of.*—The assured, at the time of the accident, gave his residence, as a memorandum on the policy, to be Topeka, Kansas. His residence was, in fact, Illinois. *Held*, that this fact was not material to the claim, as it had a bearing upon his journey.

*Administrator, vs. Railway Passenger Assurance Co.*

—§ 68.

## WARRANTY.

§ 80. *LIFE.—And Application—Questions in Application—den of Proof—Practice.*—The policy declared one of the covenants to be the representations made in the application, and also that it was accepted by the assured on the express condition that “if any of the declarations or statements made in the application for the policy, upon the faith of which this policy was issued, shall be found in any respect untrue, then, and in such case, the policy shall be null and void.” In the application it was declared “that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned, that this application shall form the basis of the contract for insurance, and that any untrue or fraudulent answers, any suppression of fact,” shall render the policy null and void. The application contained the following questions, and answers were given by the person upon whose life the policy was issued: “7. What is the present state of the party’s health? Answer—good.” “9. Is the party addicted to the habitual use of spirituous liquors or opium? Answer—no.” “13. Has the party ever had any of the following diseases, (naming them among others,) gout, rheumatism? Answer—never.” “18. Has the party had, during the last seven years, any severe sickness or disease? If so, state the particulars, and the name of the attending physician, or who was consulted and prescribed. Answer—no.” “25. Name and residence of the family physician of the party, or of one whom the party has usually employed and consulted? Answer—have none.” The complaint did not set out the application nor state what the declarations or statements made in the application were. The answer set out the application. On trial, in the court below, after the plaintiffs had introduced their evidence and rested their case, the defendant moved to dismiss the action on the ground that the complaint did not state, nor the evidence establish, a cause of action, claiming that the statements in the application were warranties, and therefore conditions precedent to the plaintiff’s right of recovery, which it was necessary for them to aver and prove. *Held*, that “so far as the questions presented by the case at bar are concerned, it is sufficient to declare the warranty in insurance to be a part of the contract evidence

and a binding agreement that the facts stated are

on Insurance, 5th ed., §§ 754, 756; Flanders on Insurance,

tion in insurance may, for the purposes of this case, be deemed to be a statement in regard to a material fact of the applicant for insurance to the insurer."

n Insurance, § 524, et seq.

representations simply, they are not a part of the contract.

Insurance, 201 and cases cited. Campbell vs. N. E. M. L. I. Co., 381.

though expressly referred to in the policy, so as to become a part of the written contract, they may not become warranties."

n Insurance, §§ 871, 893.

if it be made by the very terms of the policy, as in the case of a warranty, an express condition of the contract of insurance, if such representations are found to be untrue, the policy is null and void, they do not necessarily lose their character as representations and become warranties, though the effect of an express condition may be to make them exclusively

s. N. E. M. L. Ins. Co., supra.

sufficient if representations be *substantially* true, while a policy must be *strictly* complied with."

on Ins., §§ 544, 669, 762, et seq.; Daniels vs. Hudson R. F. Co., 423; Chaffee vs. Cattaraugus Co. M. F. I. Co., 18

warranty, therefore, avoids a policy, while a false representation (not fraudulent) does not avoid a policy, unless it represents something which is material in fact, or is made material by the contract of the parties."

n Ins., § 524, et seq.; Flanders on Insurance, 202, 298, 326; Commonwealth vs. Mass. Ins. Co., 49 Me., 200; Campbell vs. N. E. M. L. Ins.

are, then, conditions precedent, so that their truth is ascertained by the assured, upon whom, of course, the bur-

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den of proving the same rests ; whereas the falsity of representations is matter of defense to be pleaded and proved by the insurer."

*Wilson vs. Hampden Ins. Co.*, 4 R. I., 159 ; *Campbell vs. N. E. Ins. Co.*, supra ; *McLoon vs. Conn. Mut. Ins. Co.*, 100 Mass., 474 ; *Robt. vs. Peoria M. and F. I. Co.*, 28 Ill., 238 ; *Mut. Ben. Ins. Co. vs. Robt.*, 54 Ill. ; *Leete vs. The Gresham L. I. Co.*, 7 Eng. Law and Equity, 5.

*Held*, also, that "the leaning of all courts is, to hold such stipulation to be a representation rather than a warranty, in cases where there is any room for construction ; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view, in making their contract."

*Daniel vs. Hudson River F. Ins. Co.*, 12 Cush., 424 ; *Campbell vs. England Mut. Life Ins. Co.*, 98 Mass., 381 ; *Flanders on Insurance*, 1 ; *Wilson vs. Conway F. Ins. Co.*, 4 R. I., 143 ; 1 *Phillips on Insurance*.

*Held*, also, that "the statements referred to in the policy are warranties, but representations, and that, therefore, their truth is matter of defense to be pleaded and proved by the defendant. It follows that defendants' motion to dismiss the action, because plaintiffs had failed to plead or prove a cause of action, was properly denied."

*Price et al. vs. Phoenix Mut. Life Ins. Co.*

## REPORT OF DECISIONS

ED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

From certified transcripts in our possession.

### SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1871.

Appeal from Peoria Circuit Court.

RITY INS. CO., OF NEW YORK, *Appellant*,

vs.

WITT C. FARRELL, *Appellee*.\*

[Continued from April Number, page 302.]

ar, after providing that distilled spirits, spirits, alcohol,  
spirit within the meaning of the act, shall be that sub-  
stance as "ethyl alcohol, hydrated oxide of ethyl or spirit of  
" And the tax shall attach to this substance as soon as it is  
as such, whether it be subsequently separated as pure or  
, or be immediately, or at any subsequent time, trans-  
any other substance, either in the process of original pro-  
cess any subsequent process."

of this provision was to follow the substance, in what-  
might assume, so as to prevent fraud and check every at-  
tempt of the production, to avoid the payment of the tax.  
of the law is often explained and restrained by other

ordered January 22nd, 1872.

parts of the same law. In delivering the opinion in the case of *Whitton vs. Coke*, 2 Cranch, 33 Ch. J. Marshall said, "That as the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the Legislature, and that the details of one part may contain regulations respecting the extent of general expressions used in another part of the act, are among those plain rules laid down by common sense in the exposition of statutes, which have been uniformly acknowledged."

Section one of the act provides "That there shall be levied a tax on all distilled spirits \* \* \* a tax of fifty cents on every proof gallon, to be paid by the distiller, owner, or person in possession thereof before removal from distillery warehouse."

Every distiller is required, by subsequent sections, to give notice of the intention to commence business, and annually to execute a bond with at least two sureties that he will comply with all the provisions of the law in relation to distillers, and pay all penalties incurred by him for a violation of any of the provisions of the act.

Section fifteen then provides that every distiller shall furnish a warehouse to be known as a distillery warehouse, and to be used for the storage of distilled spirits, and then uses these words: "The tax on the spirits stored in such warehouse shall be paid before removal from such warehouse."

By subsequent sections all spirits must be drawn from the reservoirs into casks; and on the first, eleventh and twenty-first of each month entered for deposit in the distillery warehouse, after a compliance with the law, the casks must be stored in the warehouse.

Then a bond must be executed by the distiller or owner, conditioned for the payment of the tax before removal from the warehouse within one year from its date.

No casks can be removed from this place of deposit without order from the collector, after the payment of the tax, and placing on the head of each cask a stamp on which shall be engraved the number of proof gallons contained therein, and which shall also contain the serial number of the cask, the name of the person by whom the tax was paid, and the person to whom, and the place where it is to be delivered, and the gauger is also required to cut or burn upon each cask the name of the distiller, the date of the payment of the tax, the number of proof gallons, and the number of the stamp.

Between the time of storage and removal, the spirits are in *custodia legis*. They are under the control of the officers of the United States

turer is compelled to provide the warehouse for stored to deposit therein under heavy penalties, or forfeit of his first bond ; and certain forms must be observed

was created, and the personal liability existed immediately, wherefore the requirement of the warehouse in it? \* \* wherefore the postponement of payment for provided in the condition of the bond given upon entry

must be paid within one year from the entry and date of the law then perhaps regarded the distiller as a con- speculator in the article.

over one hundred thousand gallons were deposited. The provisions of the act seem generally to have to the payment of the tax after deposit, and before re- Legislature certainly never intended that the tax on the be paid before it became productive. When does it utive? When does it form a part of the commerce of It surely does not while in store and in the custody

effect, if possible, must be given to every word in a hypothesis that this tax is a debt and can be en- use of a total destruction of the spirits, and without any law on the part of the distiller, is wholly irreconcilable visions of the act last enumerated. It takes away all in the requirements that the spirits must be stored and before removal. If the last clause of section one, and section four, already cited, create a personal liability from manufacture, without any limitation or restriction, then it absurd verbiage to repeat, again and again, that the tax before removal. Upon this hypothesis the law cannot with say the officers of the United States.

and spirits are destroyed. Upon what will the guager up? What will he cut and burn the number of gal- The substance, to which the tax was to attach, has be- e and intangible. As we have before said, the object of revenue. To this end the manufacture of distilled spir- ncouraged. The imposition of a tax upon an article be- come productive, and its collection after the destruction, would discourage the manufacture.

on of the tax, under the circumstances, would be harsh,

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unjust and oppressive. It would be a tax upon misfortune. And the construction of a statute which would cause the citizen seriously to suffer who is innocent of wrong, and has violated none of the provisions of the act, should be avoided if possible.

The construction of this act which best harmonizes its various provisions, is most consistent with its object, and protects both the citizen and the manufacturer, is that, though a lien exists on the title from the time of distillation, for the prevention of fraud, the personal liability is only upon removal or on breach of the conditions of the bond.

We are therefore of opinion that the liability of the insurance company was only for the value of the spirits at forty-nine cents per gallon.

The judgment is reversed and the cause remanded.

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## SUPREME COURT OF MISSOURI.

MARCH TERM, 1872.

*Appeal from St. Louis Circuit Court.*

HENRY GAMBS, PUBLIC ADM'R OF THE ESTATE OF AMANDA HALLIDAY, *Appellant*,

vs.

THE COVENANT MUT. LIFE INS. CO., *Respondent*.\*

The company in 1853 issued a policy upon the life of the assured, which provided that the amount of insurance should be paid to his wife, Amanda, or her representatives. The wife Amanda died in 1856. The assured, who paid premiums, continued to pay them until 1860, when, having remarried, he procured a memorandum upon the policy that it should stand for the benefit of his then wife and others named. After this he paid the premium until his death when he died.

No instructions were given, and no exceptions were taken to any ruling of the court below, and the facts were all admitted upon the record.

This court must pass upon the legal effect of the facts in the case. It is where the facts are disputed, and there is evidence tending to sustain the facts of each party, that the losing one is concluded by the finding of the trial

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\* Decision rendered April 20th, 1872.

direct interest in the life of her husband, and such an interest as a policy in her favor upon his life.

taken out by the husband for the purpose of securing the support after his death, but the object being lost, he was not bound to con-

policy for the benefit of her representatives.

ght with the consent of the company to change the beneficiaries. ent after the change was in the interest of the present wife.

BLISS, J.

defendant issued a policy of insurance upon the life of liday, husband of said Amanda, payable to her or her entatives. In 1856 his said wife, Amanda, died, but her o had all along paid the premiums, continued to pay them ry, 1860, when having remarried, he procured a memor- the policy that it should stand for his then wife and oth-

William Halliday continued to pay the premiums until he died, and on due proof of his death, the defendant ount called for by the policy to the beneficiaries named in adum. The plaintiff sues for the amount of the insur- ing that it belongs to the representatives of the deceased

tions were given and no exceptions were taken to any e court; hence the defendant contends that there is us to review. But the facts are all admitted upon the re- must pass upon their legal effect. It is only when they and when there is evidence tending to sustain the claim y, that the losing one is concluded by the finding in the

perceived that the policy was issued and the wife died option in this State of the statutory provision expressly policies in the name of and for the separate use of the nder however contended that as a common law policy it is void, the wife had no such insurable interest in the life of as would sustain it. Gambling or wager policies are the person for whose use they issue have no pecuniary in- life insured. But the wife has a direct interest in the husband. The law requires him to support her, and in ne is actually dependent upon him for support. This cre- rest, and her relation is not the same as that of a wife ne husband or father who takes out a policy upon their own benefit, and the language of Kent, (3 Com., 368,) urable interest in the life of another person must be a

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direct and definite pecuniary interest, and a person has not a mere interest in the life of his wife or child merely in the character of a husband or parent," does not authorize the conclusion that a policy which provides for no pecuniary interest independent of the statute in the life of the insured is void. Judge Scott, in *McKee vs. Phoenix Ins. Co.*, 28 Mich. 400, whose opinion is criticised by counsel, takes, I think, a more sensible view of the question. The original policy then must be treated as a contract, and had the husband died during the life of the beneficiary, the conditions having been fulfilled, it could have been enforced.

But it does not follow that the action of the husband in purchasing the policy after the death of the wife must be held to have been for the benefit of her representatives. The only ground upon which the policy could be maintained when issued, is the fact that the wife had a right to life insurance from the husband for support. It was taken out for the purpose of securing her support after his death. The premiums were paid by the husband, and the whole was instituted and carried on for this laudable purpose. This object being forever lost, was the husband bound to continue the policy for the benefit of her representatives? Could he surrender it, or by failing to pay further premiums let it lapse? Could he not, with the consent of the company, change the beneficiary? He must be held to have that right. It amounts to a surrender of the old policy and the issue of a new one. Every policy made after the change was in the interest of the present wife. If the husband had refused to pay at all, who would be the plaintiff and could he recover? The payments upon renewal were not for his benefit, and he has no claim to that which they secured.

The right of the husband, after the wife's death, to dispose of the policy obtained by him for her benefit, is sustained by the Supreme Court of Wisconsin in *Kerman vs. Howard*, 23 Wis., 108, and in no case where the husband would be required to keep the wife alive for the benefit of her heirs.

The judgment will be affirmed. The other judges concur.

P. B.

SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1872.

*Appeal from Mercer Circuit Court.*

ROCKFORD INS. CO., *Appellant,*  
 vs.  
 ALAN NELSON, *Appellee.\**

that the conditions annexed, constitute an entire contract, and in default of it, the contract, or a sufficient portion of it to show a right of recovery, must be set out either in terms or in substance. All precedent acts, relative to the assured, should be set out, and their performance averred; but acts subsequent to the right of recovery, and all acts to be done by the insured, may be omitted.

"W. D.," in the application, to the inquiry whether the title to the property was a warranty-deed or a bond, will not be held as a representation of any particular kind of title, and even an answer in the application, that the property was a warranty-deed, is not an assertion that such a title is a fee.

A statement in the declaration that the insured was the owner of the property, was only bound to prove that she held and owned an insurable interest.

When a technical meaning must be construed with reference to the facts, which it is applied.

When a man abandoned his wife, the insured, and when he left, made her a separate homestead, upon which she and the family remained, and upon which she erected the building insured, with her own earnings, which by the law she was entitled to in her own right. *Held*, that she had such an ownable interest in the property.

If the company made out the application with a knowledge of the facts, and there was no collusion between him and the insured, the company is bound by the statements of the application in regard to the title and situation of the property, as to other building and the purposes for which it was occupied.

On trial, that the building insured was represented in the application as a boarding-house, when it was in fact a public hotel; that the insured agent was prohibited by the company from receiving applications for insurance on such buildings, and that there was collusion and fraud between the agent and the insured, in making the application. *Held*, that if the things alleged were true, the knowledge of the agent would not be considered the

rendered February 7th, 1873.

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knowledge of the company, and his knowledge of the facts could not affect the company, unless known and assented to by them.

The violation, by an insurance agent, of the secret instructions of the company does not affect the insured, unless he has notice of them, and the insured is bound by the general instructions of the agent, unless they are brought to him by notice.

The original policy was burned, and the company furnished the instrument on, as a copy. Having done so, they are estopped from denying that it is a true and correct copy, and that the policy was under seal, and that the suit should have been in covenant, and not in assumpsit.

It is not error for the court to refuse to repeat instructions already given, although there may be a slight change in the phraseology.

From the evidence, the loss could not have equalled the amount allowed the jury, even after deducting the amount remitted.

WALKER.

This was an action of assumption on a policy of insurance issued by appellant to appellee. It covered a house described as a dwelling and boarding-house, household furniture, beds and bedding, wearing apparel and provisions, all in the house, also a barn on the same premises, but the latter is not in controversy, as it was not burned. The complaint avers the property was destroyed by fire in such a manner as to render the company liable to pay for the loss. Appellants filed a general issue and fourteen special pleas. To which there were severals demurrers, followed by rejoinders. In making up the issues, several demurrers were sustained or overruled, of which appellants complain. But we deem it entirely unnecessary to consider the questions presented, as all of the pleas interpose defences that were not only admissible under the general issue, but were presented by the evidence and instructions, and considered by the jury. No practical benefit would arise to any one by determining whether the court erred in settling the pleadings, and we therefore pass them over without discussion. It is urged that the court below erred in admitting the policy of insurance under the first count of appellee's declaration, because it is claimed that there was a variance. The policy with its conditions annexed constitute an entire contract, and in declaring upon the contract, it is necessary to set out a sufficient portion of it to show a right of recovery, must be set out either in terms or in substance. This is like suing on a penal bond at common law, where the plaintiff may simply count on the bond and leave the defendant to set up the condition and plead performance. But in a case of this character, where the money only being payable upon the assured performing certain conditions, all such precedent acts should be set out, and their performance averred. But all conditions subsequent to the right of recovery

done by the company in discharge of their liability, may and left to be set up as a defense.

conditions were not set out in the first count, and hence with a variance as should have excluded the policy as evidence in the count, or the instruction to disregard it under that instruction have been given. The declaration in this case avers that she was the owner of the property insured, not that she owned the house and lot in fee, as is urged by appellants.

Carefully examined appellant's abstract, and taken it to be that she concluded counsel must be under a misapprehension as to the facts. At any rate, we have been unable to find the averment in their argument. If they infer that because the policy was made a part of the policy, and therein declared to be that she held the title specified in the application, still we are not inclined to find she applied for insurance on one dwelling. And when asked whether the title was a warranty-deed or a fee, the answer is, "W. D.," and when asked "Is your property insured?" the answer is, "None." These are the only expressions in the application in reference to appellee's title. And we fail to find any indication of the meaning attached to words, that she has herself asserted as holding any particular kind of title. The words "warranty-deed," do not import title of any kind. The letters "W. D." have no such meaning, nor has the question, "Is your property insured?" If the letters "W. D." mean a warranty-deed, it is not from extrinsic evidence, if that could be received. They have no fixed and definite meaning in the law, nor in any connection even in the connection in which they are employed. We cannot ascertain their meaning, but it is not apparent. But if it was that they mean appellee's title was a warranty-deed, still we are not inclined to make an assertion that such a title is a fee. No member of the court would presume to say that it was. All know that a warranty-deed may pass a term of years, a life estate, a fee, or less estate, and it may be no estate whatever. It conveys, as all know, only the interest of the grantor, whatever it may be. If he has none, it can be of no value to the grantee. These are elementary rules of the simplest kind. We then look in vain to find any assertion in the application of the kind of title, or the nature of the estate she claimed. It does not appear from the application that she was required to aver that she held a fee or other absolute estate, in the lot and house. The averment in the declaration that she was the owner of the property, what was she bound to prove? Manifestly that she

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held and owned an insurable interest. Such a title as if there be loss it would fall upon and have to be borne by her. In a declaration on a policy of insurance, the averment that the assured was owner of the property destroyed must be considered with reference to the contract of insurance. It amounts to an averment that the assured had an insurable interest, and not that he was the absolute owner of the property. When he sues, his right to recover depends upon whether he was the owner of an insurable interest, and not whether he was the absolute owner. And the averment must be so construed. It cannot be construed as it would be in a contract of a covenant to convey land, as in such case the thing sold and purchased is the land, and when the vendor says in his covenant that he is the owner, and agrees to convey it to another, the law holds that the parties understood by the covenant that it was the land that was sold, and that the assertion of ownership implied the vendor held the absolute title, and had agreed to convey such a title as would vest in the vendee absolute ownership. Language not having a technical meaning must be construed with reference to the subject to which it is applied. Then under either the application for the insurance or the averment in the declaration, appellee was only bound to prove that she held a title as gave her an insurable interest, and all questions beyond that were immaterial.

The question then arises whether appellee held such a title. The evidence shows that the house and lot had been occupied by her and her husband and family as a homestead. That he had abandoned the property and had made a verbal gift of the property to her when he left. That she with the family had remained on and occupied the house and lot as a homestead, she being the head of the family. She by her own earnings, and with her own money, in no wise derived from her husband, erected the building either in whole or in part. This undoubtedly gave her an insurable interest in the property. She was not the owner of the right to occupy the premises as a homestead, free from a forced sale to the extent of one thousand dollars, and appellee was not entitled to her earnings under the act of 1869, in her own right whilst separated from her husband, a court of equity would have protected her in their enjoyment against her husband, even by placing them in the building. We are not prepared to hold that equity there was not such an execution of the gift as would as against the husband have compelled a conveyance. At any rate, equity would have restrained him from dispossessing her of the property, and would have charged it to the extent that she expended money

t. She clearly had, as the proof shows, such an owner-  
 her an insurable interest in the property, and that was  
 required to show under her declaration. If the agent of  
 made out the application for insurance with a knowledge  
 and there was no collusion in doing so between him and  
 an appellant is bound by its statement as to title, the situ-  
 property in reference to other buildings, as well as the  
 s to the purposes for which it was occupied and used.  
 en the uniform ruling of this court for many years, and  
 t appellee is illiterate, being unable to write or read writ-  
 bably, as such persons usually are, not well informed, and  
 sed on as to the nature and contents of written instru-  
 case does not appeal to us with any force to review and  
 ong line of decisions to relieve the company from liability.  
 a meritorious defence, let it be made on the grounds pre-  
 ut we cannot overrule established principles to relieve  
 feel that the rule is salutary, and almost indispensable for  
 on of a large class, if not the majority of the community,  
 know or even dream of the force and effect that is to be  
 h an application when it is executed.

various objections taken to appellee's instructions. We  
 objection to the first, but the second is faulty in the fact  
 ts that the knowledge of the facts in regard to the pur-  
 which the house was used, was the knowledge of appellant,  
 y were told to find there was no fraud in that respect.  
 ction wholly ignores the issue that the house was, by fraud-  
 ion between the appellee [and the agent,] represented as a  
 d boarding-house, when it was in fact a public hotel. As  
 vere joined, the jury should have been left to find whether  
 el, and whether she knew the agent was prohibited from  
 applications to insure such buildings, and whether there was  
 d fraud in making the application as it was done. If these  
 e all true, then the knowledge of the facts by the agent  
 effect the company unless known to and assented to by  
 e knowledge of the agent in such a case would not be con-  
 knowledge of the company, because if so engaged in de-  
 s principal, he would not be presumed to have communi-  
 nformation to appellant. This instruction, as we under-  
 cludes the question of fraud and collusion from the con-  
 of the jury, and should not have been given. It is object-  
 third of appellee's instructions is wrong. It may be the

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instruction is too broad in telling the jury if they find the representation of her title in the application to obtain the policy were true, if they believed certain facts to be true, there was no fraud in the prospect where there was no issue of fraud on that question. And her objection is urged that this instruction tells them that if the proposed facts are true, that they should find that appellee had a insurable interest. It is contended that she might have an insurable interest and still not be the owner, as averred in her declaration. It seems to us that the true question is whether the facts stated in the instruction was evidence of ownership as averred in the declaration, and we think they were ; and in that respect the instruction was not calculated to mislead the jury.

We perceive no objection to the fourth of appellee's instructions. The facts the jury are required by it to find seem, as far as we can see, to exclude any and all kinds of fraud insisted on in this instruction. The eighth of appellee's instructions is liable to the objection urged against the second, in so far as it ignores the defense of fraud and collusion. The ninth instruction is wrong in directing the jury to compute interest on the value of the property destroyed. Now, under the terms of the policy, appellee was only entitled to recover two-thirds of the value of the house, whilst this instruction authorized the jury to compute interest on its full value. We see no objection to appellee's twelfth instruction. It has been repeatedly held that where insurance agents have secret instructions, as they are believed to have generally, a violation of secret instructions does not affect the contract with the assured unless he has notice of them ; and the assured is not bound by the general instructions of the agent, unless they are brought home to the assured by notice. In the case of the *Ætna Ins. Co. vs. McGuire*, 51 Ill., 342, it was said : " We desire it to be understood that this jurisdiction at least, when an insurance company has appointed an agent, known and recognized as such, and he by his acts, known and acquiesced in by them, induces the public to believe he is vested with authority necessary to do the act, and nothing to the contrary is shown or pretended at the time of doing the act, public policy, for the safety of the people, demand the company should be liable for the acts as appear on their face to be usual and proper in and about the business in which the agent is engaged. It is the fault of the companies in sending agents out among the people, gaining public confidence by the seeming acquiescence of their constituents in the conduct of their business. When a loss happens they should not be permitted to say in any case their agent acted beyond the scope of his authority."

shall be made to appear the assured was informed of and precise extent of the authority conferred. Any other operation would be turning loose upon an unsuspecting, confiding people a horde of plunderers, against which no vigilance could guard." And see *N. E. F. and M. Ins. Co.*, 38 Ill., 166. The instruction is fully sustained by these objections that the suit should have been in covenant, and in fact, as the policy was under seal. This no doubt is true and a true proposition, but parties may undeniably waive such objections and stop themselves from urging such objections. In this case the original was burned, and the company, on being requested, furnished an instrument sued on as a copy, and having done so, they were estopped from denying that is a true and correct copy. Otherwise, would be to permit appellants to successfully pervert and on appellee. It would be no less a wrong than to induce her to bring the only action she could maintain on the merits, and which appellant had said was, and then, after the time had expired, within which she could maintain her suit, raise a technical objection and wholly defeat a recovery. This would be so manifest that no court could lend its sanction to such practice. Section 18 of the statute of 1872, p. 341, has authorized this suit to be brought on such a policy even if it appeared on its face to be under seal. It is true this act was not adopted until after the trial was had, but it must have effect on all cases pending at the time of its passage, and must govern this case on another ground. The court did not therefore err in refusing to give appellant's instructions fourth, twenty-fifth, twenty-sixth and twenty-seventh inasmuch as they were estopped from being heard to say that the policy was under seal. In this case appellant asked the unprecedented forty-six instructions, many of them of great length. A number of them were given—certainly all appellant was entitled to. We feel no disposition to uselessly waste time in considering those refused, and hence pass them over by saying that the court acted properly in so doing. Many of these instructions being repetitions, several times stated with no apparent necessity, unless it be to create confusion, or encumber the record, we are of opinion that this court has long and uniformly held that it is proper for the court to refuse to repeat instructions already given, and there may be a slight change in the phraseology. On the subject of the assessment of damages, we are clearly of the opinion that the damages were too large, even after the remittitur was entered. From

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the evidence, there could not have been destroyed the value of the furniture and bedding allowed by the jury, nor the amount of wearing apparel. Even after deducting three hundred dollars, the amount remitted would be sufficient to pay the note.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

## SUPREME COURT OF INDIANA.

*Appeal from Lake Circuit Court.*

FRED. J. HOFFMAN, *Appellant*, )  
 vs. )  
 CHARLES W. BANKS, *Appellee*.\* )

In April, 1870, the appellant gave his promissory note, payable five months after date, to the agent of a life insurance company, as payment for the first premium on a policy upon his life. The policy was delivered to him in May of the same year, and acknowledged the receipt of the premium.

The company did not file a statement of its condition until July, 1870, and no certificate of authority to do business in the county was not issued to the company until December following.

The act of the Legislature of 1865 provided that it should not be lawful for any agent of any insurance company, incorporated by any other State, directly or indirectly, to take risks or transact any business of insurance in this State without first producing a certificate of authority from the auditor of the State. The act prescribed what things should be done to authorize the auditor to issue his certificate, among which was the filing of a statement by the company. The act also made a violation of the provisions of the act punishable by fine or imprisonment, or both.

An act of the Legislature, regulating foreign insurance companies, passed in 1865, contained provisions entirely different from those relating to such companies contained in an act of 1852, respecting foreign corporations. *Held*, that the act of 1865 was intended by the Legislature as a substitute for the act of 1852.

*Held*, that the party seeking to enforce the contract is not the one the Legislature proposed to protect, and that the note was not valid, and that a new judgment should have been granted.

OSBORN,

On the 29th day of April, 1870, the appellant executed his promissory note, payable five months after date to the appellee, for \$200.

\* Decision rendered January 22nd, 1873.

stituted upon the note before a justice of the peace, and rendered against the maker. He appealed to the Circuit that court there was a trial and finding for the appellee amount of the note and interest. Motion for a new trial overruling that motion.

Ground of the motion for a new trial was that the finding was against the evidence, and the error assigned is that the court overruling that motion.

Evidence is all set out in the bill of exceptions, and as the testimony of the appellant is brief, we state it as follows: "I executed said note. I gave said note for life insurance in the World Mutual Insurance Company, of New York. I gave the note as first premium of twenty-five dollars to said World Mutual Insurance Company, of New York. I was insured for one hundred dollars. I gave the note to C. W. Banks. He was the agent of the company. I gave the said note at the time I made application for life insurance. I did not notice at the time whether the note was made to the insurance company, or C. W. Banks, the agent. I was running to the company. I made application for said note to C. W. Banks, the agent. I gave C. W. Banks, the agent, my authority to pay in advance any money for me to the insurance company. If he did advance any money for me to the company at said note, he did so on his authority and responsibility. I do not know whether the company got the \$25.00 or not. I got my policy from the company in May, 1870. I offered the policy to Banks when he was out here, some time in the fall of 1870, and told him I would pay the survey fee and the examining surgeon's fee. He refused to do so."

The clerk of the court testified that no statement of the company was in his office on the day of the date of the note, and none was on the first day of January, 1870, and no power of attorney or other instrument of any kind of the company on file in his office between the first day of January and the 29th day of April, 1870.

A statement of the auditor of State was introduced, bearing date of the 22nd, 1870, reciting that the company had filed in his office a statement required under the act of the General Assembly of 1865, (3 Ind. Stat., 312,) and stating amongst other things that the statement showed the condition of the company on the 1st day of July, 1870, and that R. H. Wells, authorized by a power of attorney duly executed by the company, to act as agent for the company, for Lake County, to acknowledge service of process for

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and on behalf of the company, and consenting that such a policy should be taken and held to be as valid as if served upon the company, and waiving all errors by reason of such service. And Wells thereby authorized to transact the business of insurance agent for the company.

The policy of insurance was not in court, but the defendant admitted that he received it; that it was in the usual form, signed by the president and countersigned by the secretary of the company, and showed the receipt of the \$25.20 premium.

The appellee offered no other evidence than the note, which was reported to be made at "Crown Point," Indiana.

The main point in the case, and the only one that we considered necessary to decide, strikes at the validity of the note. It will be seen by a reference to the evidence that the note was dated in April; that the policy of insurance was issued in May; that the statement of the company could not have been filed with auditor prior to the first of July, because it showed the condition of the company, and the authority to Wells to act as agent was given by the auditor on the 22nd day of December. No such authority was ever given to the appellee to act as such agent.

In the *Rising Sun Insurance Co. vs. Slaughter*, 20 Ind., 520, the court held that the act respecting foreign corporations, etc., approved June 17th, 1852, (1 G. and H., 272,) included foreign insurance corporations, and that a policy issued by a foreign company under a contract therefor, entered into in this State, by one assuming to act as the agent for the company, and holding himself out as such, without having first complied with the requirements of the law, was void.

The first section of that act provides "that agents of corporations not incorporated or organized in this State, before entering upon the duties of their agency in this State, shall deposit in the clerk's office of the county, when they propose doing business therefor, the power of attorney, commission, appointment, or other authority, under which, by virtue of which, they act as such agents." The second section relates to filing a resolution, etc., of the company, authorizing suits to be brought against them in the courts of this State, and the service of process on their agents. The third section provides that such foreign corporations shall not enforce, in any courts of this State, any contracts made by their agents, or persons assuming to act as their agents, before a compliance by such agents, or persons acting as such, with the provisions of sections one and two of the act.

By the first section of an act of the General Assembly of

passed Dec. 21st, 1865, 3rd Ind. Stat., 312, it is enacted, "It shall not be lawful for any agent or agents of any insurance company incorporated by any other State than the State of Indiana, to come into this State, or indirectly to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the Auditor of State."

Section seven describes what shall be done to authorize the auditor to issue such certificate. Section seven provides that "any person or persons violating the provisions of this act shall, upon conviction thereof by a court of competent jurisdiction, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not more than thirty days, or both, at the discretion of the court."

The appellant contend that the provisions of both acts are unconstitutional, and that such companies must first obtain the requirements of both, before their agents can legally transact business for them.

At the session of the Legislature at which the act in relation to foreign insurance corporations was passed, the Legislature also passed an act regulating the incorporation of insurance companies, etc.

That act was included a section in relation to foreign insurance companies, relative to their agencies and what must be done before they could act as such. That section was pronounced invalid by the court on the ground that it was unconstitutional. *Igoe vs. The State*, 12 Ind., 239. In the case of *The Rising Sun Insurance Co. v. State*, 20 Ind., *supra*, it was contended that the Legislature had no authority to include foreign insurance companies in the act in relation to foreign corporations, because it had made other provisions in relation to them in another act; but the court held "that an attempt to legislate on the subject matter of legislation evidently included in the act of 1865, had been the subject of other, but unconstitutional legislation, could not be permitted." That decision was made in May, 1865, the act regulating foreign insurance companies was passed. By the provisions of that act, the act regulating the business of insurance companies was entirely different from those required by the act in relation to foreign corporations.

Under the act it was required to be filed in the office of the auditor of state, and he was to issue certificates of authority to the agents. By the act he was to have a fee of five dollars in such case, for the cost of the statement and investigation of the evidence of insolvency, and two dollars for each certificate of authority issued under the provisions of the act, to be paid by the agent or agents applying for the same.

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ing for the same. Section five declares that all papers requiring the act to be deposited in the office of the auditor, certified under the hand of such auditor to be true copies of such papers, shall be received as evidence in all courts and places the same as the originals. Section one of the act of 1865 confers power upon the auditor to issue a certificate of authority to an agent to act as such, and section five fixes the fee for it.

We think that act was intended by the Legislature as a substitute for the act of 1852, so far as the latter related to foreign insurance companies, and that when the provisions of the act of 1865 are applied with, and the auditor of State issues his certificate authorizing the agent to act as such, such certificate will be a sufficient authority to legally transact business for the company.

At the time of the execution of the note in this case, and the delivery of the policy, the auditor had not issued a certificate authorizing Banks or any one else to act as the agent of the company in this County, nor had the company filed with the auditor any statement required by the act of 1865, or in any manner complied with its requirements, and that brings us to the question of the validity of the note.

The appellee contends that as long as the appellant holds the policy, it is unjust for him to refuse to pay the note. He thinks the policy valid, and that therefore the note is also valid, and we are referred to 25 Ind., 536, as practically overruling 20 Ind., 520. The case in 25 Ind., *supra*, was instituted to recover upon an agreement of insurance. The complaint was silent as to whether the agent of the company with whom the agreement was made had complied with the requirements of the law or not. A demurrer was filed, and the counsel for the company contended that all contracts of foreign corporations were void, and that the exception to this rule was where they comply with the provisions of the law, and that the complaint was bad for not showing such compliance. The court held that in the absence of any averment showing a violation of the law, it would not be presumed. The judge who delivered the opinion of the court, admitted the general rule of law to be that the courts would not enforce contracts prohibited by statute, and he also admitted that the rule was not applicable when the prohibition was for the mere protection of one of the parties against an undue advantage which the other was supposed to possess over him.

In this case the party seeking to enforce the contract is not the one that the Legislature proposed to protect. The contract

that the note is not valid, and that a new trial ought granted. As the case does not require it, we give no the validity of the policy of insurance. The judgment the Circuit Court is reversed with costs, and the cause to said court with instructions to grant a new trial, er proceedings not inconsistent with this opinion.

**APRIL TERM, 1872.**

**HOUGH, WM. CLENDENING AND THOS. CLENDENING, TRADING AS HOUGH, CLENDENING AND THE USE OF THEIR ASSIGNEE, THE BALTIMORE ICE Co.**

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**DENT AND DIRECTORS OF THE PEOPLE'S INS. CO., OF BALTIMORE\***

of insurance states that "the company insures the Baltimore Company against loss or damage by fire to the amount of \$20,000, on merchandise their own, or held by them in trust, or in which they have an interest or liability," parol proof is not admissible to show that the policy covered "merchandise their own," etc., as therein stated; but was intended to cover the merchandise only under certain circumstances; and if the merchandise was insured by the owners thereof in other companies, the interest of the warehouse company in said policy was not insured.

of insurance is couched in plain and unambiguous language, re-  
ne must be had to determine the intention and meaning of the par-  
; parol proof is inadmissible for such purpose.

of February, 1870, and the 15th of July, 1870, both days including the 1st of January, 1870, the following quantities of cotton bolls, cotton seed, and cotton linters, deposited on storage in a certain warehouse, occupied by the Warehouse Company, sundry lots of cotton in bales. For each

ered June 20th, 1872. To appear in 36 Md. Syllabus and statement of case  
ett, Esq., State Reporter of Maryland.



lot deposited, the appellants received from the Warehouse Company a receipt, warrant or certificate, which specified the number of bales, and the date of deposit, and also the mark on the bales, the letters X. Q. being marked on each bale so deposited. These receipts or certificates were all numbered 1221, the 20th of June, 1870, the appellants deposited fifteen bales and took a receipt therefor, numbered 1221, and on the following day a policy of insurance was taken out to cover the particular number of bales thus deposited. On the 27th of June, the appellants deposited thirteen bales, and took a receipt therefor, numbered 1238, and on the same day effected an insurance on the particular number of bales thus deposited. On the face of each policy, the loss, if any, was made payable to the Warehouse Company; and the policies and receipts were delivered to the Warehouse Company, to secure advance made by it. On the policy on the fifteen bales there was indorsed in pencil figures the number 1221, corresponding with the number of the warehouse receipt given therefor; and on the policy on the thirteen bales there was indorsed also in pencil 1238, corresponding with the number of the receipt for the cotton. At the time of each deposit, the depositor reserved a sample of the particular lot deposited. *Held,*

That the policies were specific and not general; that each covered and was intended to cover the specific number of bales in each deposit, and the insurance which was effected at the time of the deposit; the policy of the 21st of June, 1870, covering only the fifteen bales deposited on the day previous, and the policy of the 27th of June, the thirteen bales deposited on that day.

H. having deposited a large amount of cotton on storage with the Baltimore Warehouse Company, effected, among others, an insurance against fire on two particular lots; at one time on fifteen bales, and at another on thirteen bales in a warehouse containing the cotton of H., with that of others, was destroyed by fire. A portion of the cotton was saved and sold at auction by instruction of a committee of the insurance companies interested. The net proceeds of the sale were distributed under the direction of the committee among the assured. In an action by H. to recover on his two policies, it was *Held,*

That in ascertaining the amount of loss or damage which the plaintiff should recover, the jury ought to deduct such sum as they might find from the evidence was the proportion due to twenty-eight bales, in the distribution of the net proceeds of sale of the cotton saved.

The Baltimore Warehouse Company, which received goods on storage, and issued receipts or certificates therefor to the depositors, effected an insurance in the Associated Firemen's Company for \$10,000.00, against loss by fire for the year, "on merchandise generally hazardous or extra hazardous, held by them or in trust, contained" in a particular warehouse; they also took out a policy in the Home Insurance Company, to the amount of \$20,000.00, "on merchandise, hazardous or extra hazardous, their own, or held by them in or in which they had an interest or liability," contained in the same warehouse. The appellants, on the 20th of June, 1870, deposited fifteen bales of cotton in the same warehouse, and received a receipt or certificate therefor from the Warehouse Company, and on the same day procured a policy of insurance on the cotton so deposited from the appellee. On the 27th of June they deposited thirteen bales, for which a like receipt was given, and on the same day they effected an insurance for the cotton with the appellee. Under the policy issued to the appellants, the loss, if any, was payable to the Baltimore Warehouse Company. The appellants had other cotton to a large amount stored with the Warehouse Company. The Warehouse Company advanced to the appellants over \$48,000.00 upon the cotton belonging to them, and stored in the Warehouse. In the policies to the appellants, as well as in those to the Warehouse Company, it was stipulated that in case of loss, the assured should not be entitled to recover on such policy any greater proportion of the loss or damage sustained to the subject insured, than the amount thereby insured should bear to the whole amount of the several insurances thereon. On the 18th of July, 1870, the warehouse was burned, and of the cotton stored in it, some of the bales were saved, some were partially destroyed, and other

oyed. In an action by the appellants, for the use of the Warehouse on the policies of insurance issued by the appellee, it was *Held*, policies sued on having been made to the Warehouse Company, insured left of the company, and may be considered as in favor of the same on the same interest, in the same subject, and against the same risks policies which were issued directly to the Warehouse Company ; and latter policies constituted a double insurance ; and the companies issuing the policies were bound to contribute their respective proportion of the loss.

ing goods in his possession as consignee, or on commission, may insure in his own name, and in the event of loss, recover the full amount of insurance, and, after satisfying his own claim, hold the balance as trustee for the owner.

*held in trust*," applied to goods insured, mean goods with which the insured is intrusted ; not goods held in trust in the strict technical sense, so that there is only an equitable obligation in the assured, enforceable by subrogation, but goods with which they are entrusted in the ordinary sense of the word.

ons of covenant, consolidated by consent, were instituted against appellants, Hough, Clendening & Co., for the use of their assets in the Baltimore Warehouse Company, against the appellees : to recover on a policy issued by the appellees, dated the 21st of June, 1870, whereby the company insured Hough, Clendening & Co. thirty-five days from the date of the policy, against loss by fire to the amount of \$1,400, on fifteen bales of cotton in the Tobacco Warehouse, No. 2, O'Donnell's Wharf, then occupied by the Baltimore Warehouse Company ; the second to recover on a policy dated the 27th of June, 1870, whereby the appellees insured appellants in exactly similar words of description, during thirty days, to the amount of \$1,100 on thirteen bales of cotton. Appellants pleaded :

1. That they were not indebted as alleged.

2. That they did not promise and covenant as alleged.

3. That the plaintiffs did not furnish preliminary proofs of loss to the appellees according to the terms of the policy sued on, and the appellees had not waived their rights to except to the insufficiency of the proofs.

4. That during the time when said cotton was alleged to have been insured by the said policy of insurance, there were other insurers, and by the terms of said policy the defendants were liable for such proportion of such alleged losses as the amount of their insurance should bear to the whole amount of such insurance. The plaintiffs joined issue on the first, second and third, and replied to the fourth as follows :

During the time when said cotton was insured by the said

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policy of insurance, there were not other insurances thereon—that by the terms of said policy the defendants were only responsible for such proportion of the losses as the amount of their insurance bore to the whole amount of such insurance. Issue was joined on replication.

*First Exception.*—At the trial of this cause the plaintiffs, to maintain the issues on their part, proved, by the introduction of the act of Assembly of 1867, ch. 232, in the printed volume, the incorporation of the defendant, and adduced two policies of insurance against loss issued by the defendant under its corporate seal, the execution of each of which by the defendant was admitted.

The particulars of these policies, material to the issues, are the following:

In the one dated June 21st, 1870 : “The President and Directors of the People’s Fire Insurance Company of Baltimore, in consideration of one  $\frac{6}{10}$  dollar, to them paid by the insured hereinafter named, the receipt of which is hereby acknowledged, do insure Hough, C. & Co. against loss or damage by fire, to the amount of fifteen hundred dollars, on fifteen bales of cotton stored in Tobacco Warehouse No. 2, O’Donnell’s Wharf, now occupied by the Baltimore Warehouse Company ; other insurance permitted without notice until required. Loss, if any, payable to the Baltimore Warehouse Company.”

“And the said company do hereby promise and agree to make good unto the said assured, their executors, administrators or assigns, all such loss or damage, not exceeding in amount the sum hereby insured, as shall happen by fire to the property as above specified, during thirty-five days, to wit, from the 21st day of June, 1870, (at 12 o’clock at noon,) until the 26th day of July, 1870, (at 12 o’clock at noon,) the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall be lost or damaged.” On this policy there is indorsed in pencil the number in figures, “1221.”

In the other policy, dated June 27th, 1870, the corresponding portion of the contract is the same, except that the premium is “one dollar ;” the amount of insurance is “eleven hundred dollars ;” the number of bales is “thirteen ;” the time “thirty-four days,” from the 27th day of June, 1870, (at 12 o’clock at noon,) until the 31st day of July, 1870, (at 12 o’clock at noon.)

On this policy there is indorsed in pencil the number in figures, “1238.”

In the body of the contract in each policy is this stipulation :

the insured shall not be entitled to recover on this policy or proportion of the loss or damage sustained to the subject than the amount hereby insured shall bear to the whole insured thereon, whether such insurance be by specific or by floating policies." And also this: "If any other insurance or shall hereafter be made upon the said property, and stated to by this company in writing hereon, then this policy null and void."

the "conditions of this insurance," annexed to each policy, following, to wit:

the property to be insured be held in trust or on commission be a leasehold interest or equity of redemption, or if the insured in the property be any other than the entire, undivided and sole ownership of the property, for the use and benefit of the insured, it must be so represented to the company, and so in the written part of this policy, otherwise the policy shall be void.

Goods held on storage must be separately and specifically insured.

In case of any loss or damage to the property insured, it shall be the duty of the insured to take the goods at their appraised value, and give notice of their intention to do so within thirty days after receipt of the preliminary proofs of loss," etc.

The plaintiffs further proved by James Godwin: That he was in the employment of the plaintiffs during the years 1869 and 1870; that the business of the plaintiffs was that of cotton factors chiefly; that the cotton came to them from a large number of different persons, and in various sizes, from one bale upwards, and was to be sold at the discretion of the factors, or at such time as the shipper, afterwards directed by the shipper, as the instructions happened; that the cotton market was declining in the summer of 1870; that the plaintiffs had six hundred and seventy-five bales of cotton in the warehouse described in the policies sued on—which warehouse was destroyed by fire on July 18th, 1870; none of it was saved to them after the fire; that Albert Rhett had weighed the cotton by lot, before it was stored; that samples of each lot were taken out and retained in the office of the plaintiffs; that after the fire there was there a sample of each bale that was in the warehouse; that the plaintiffs had, at the time of the fire, insurance on six hundred and seventy-six bales of cotton in this warehouse—

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one more than the number in store there ; that in each of the policies held by them the insurance was on a specific number of bales.

On cross-examination, the witness said : He spoke from the back of the house, not from his own knowledge, as to the number of bales he saw the fire and knew that the cotton of the plaintiffs was the cause of the loss on this was not total ; some bales were burned, some saved ; how many were saved witness does not know, nor how many absolutely lost.

The plaintiffs further proved by William B. Hooper : That he was the storekeeper of the Baltimore Warehouse Company in 1870 ; that this warehouse was burned on the 18th of July, 1870 ; that the plaintiffs had therein six hundred and seventy-five bales of cotton ; there were in all, 1,452 bales of cotton in the warehouse at the time of the fire ; also some tobacco and bark ; the other cotton belonged to different parties.

They further proved by Albert Rhett, that he was a public weigher ; that he weighed nearly all Hough, Clendenen & Co.'s cotton ; that he was under the impression he weighed every bale of their cotton that went into this warehouse ; he gave certificates of these weights ; a certificate shown to him as his, from which it appeared that the fifteen bales of the plaintiffs, embraced in the policy of the 21st of June, weighed six thousand two hundred and sixty-one pounds, the thirteen bales, covered by the policy of the 27th of June, weighed five thousand four hundred and eighty-two pounds.

The plaintiffs further proved by Charles Rhett, that he was a cotton broker in 1870 ; it was very often part of his business to determine the grade of cotton ; was called upon by Hough, Clendenen & Co. after this fire ; went to their office, examined a number of bundles of samples ; there were six hundred and seventy-five samples ; his partner, Mr. Smith, assisted him ; examined them minutely ; graded them from "good middling" to "low middling" and "ordinary ;" made an average of the various bundles ; the whole averaged a fair class of "low middling" cotton ; estimated its value, at the time of the fire, at 18½ cents per pound.

They proved further by James Hooper, that he was president of "The Baltimore Warehouse Company ;" gave receipts for cotton deposited on storage ; for this purpose a printed blank was used, containing date, subject matter, and particular place of deposit, and the name of the depositor being filled in, and the mark inserted in an appropriate place in the margin, in manuscript. In every instance of deposit by the plaintiffs, between the 5th of February, 1870, and

July, 1870, the *mark* in the margin of the corresponding certificates X. Q. The witness produced the receipts given to the for cotton stored, which were put in evidence. The receipt the plaintiffs on each deposit of cotton contained the print that the property mentioned therein was held by the corporate bailees only and was not insured by the corporation.

Further proved by this witness, that the cotton that was saved from fire was sold at auction, by instruction of a committee of the companies; Hough, Clendening & Co, had insurance on insured and seventy-five bales of cotton in this warehouse, to the value of about \$60,000.00. The Warehouse Company had advanced to Hough, Clendening & Co., on the whole number of bales, to the amount of \$720.00.

On cross-examination, this witness said the Warehouse Company insured all the cotton in their warehouse; kept \$30,000.00 in cash to cover, in case insurance by the depositors was not sufficient; and did not insure except where advances had been made. It was part of the business of the Warehouse Company, on receiving cotton, to give a warehouse receipt, such as those already introduced in evidence; and if advances were asked, one of the conditions of the loan was, that the depositor should insure in the form adopted in the warehouse, and deliver such policy to the company, together with the warehouse receipt; the insurance to be for an amount sufficient to cover the advance. The defendant proved by this witness, in evidence two policies of insurance held by "the Baltimore Warehouse Company," and outstanding at the time of the fire.

Policy No. 1542, Home Insurance Company of the city of New York, for \$20,000.00, bearing date December 7th, 1869, of which the material to this issue are contained in the following extracts, to wit: The body of the contract it is stipulated thus:

On this policy the Home Insurance Company, in consideration of the sum of twenty thousand dollars to them paid by the insured, hereinafter named, do hereby acknowledge, do insure the Baltimore Warehouse Company against loss or damage by fire, to the extent of twenty thousand dollars, on merchandise, hazardous or otherwise, their own, or held by them in trust, or in which they have an interest or liability, contained in that part of State Tobacco Warehouse No. 2, used by them, lying between Frederick Street Dock and the Baltimore Dock, separated by a street from the south end of the Maryland Refinery; other insurance permitted without notice, un-

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less required ; to cover whilst on the street and pavement around warehouse, as per application. And the Home Insurance Company above named, for the consideration aforesaid, do hereby promise to agree to make good unto the said assured, their executors, administrators or assigns, all such loss or damage not exceeding in amount the sum insured, as shall happen by fire to the property as above specified during one year, to wit : from the 7th day of December, (at 12 o'clock at noon,) until the 7th day of December, 1870,) (at 12 o'clock at noon)—the loss or damage to be estimated according to actual cash value of the said property at the time the same shall happen," etc.

"If any other insurance has been, or shall hereafter be made on the said property, and not consented to by this company in writing hereon," "this policy shall be null and void. In case of loss, the assured shall not be entitled to demand or recover on this policy a greater proportion of the loss or damage sustained to the subject insured, than the amount hereby insured shall bear to the whole amount insured on the said property."

And among the "conditions of insurance" annexed were the following :

4. "If the property to be insured be held in trust, or on commission, or be a leasehold or other interest not absolute, it must be presented to the company, and expressed in the policy in writing; otherwise the insurance as to such property shall be void." "Goods held on storage must be separately and specifically insured."

9. "Persons sustaining loss or damage by fire, shall forthwith give notice thereof," etc., "and as soon after as possible they shall deliver in as particular an account of their loss," etc. "And they shall swear to the company the same with their oath," etc., "declaring what other insurance, if any, existed on the same property, and giving a copy of the written portion of the policy of each company," etc., "and until such proof, declaration," etc., "are produced," etc., "the loss shall not be payable."

2d. Policy No. 11,898, Associated Firemen's Insurance Company, for \$10,000.00, dated October 29th, 1869, of which the parts material to the issues here joined are contained in the following extracts from the body of the contract, which is under the seal of the company covenanted thus :

"This instrument, or policy of insurance, witnesseth, that the undersigned and directors of the Associated Firemen's Insurance Company of Baltimore, in consideration of the sum of fifty dollars to the

paid, the receipt whereof is hereby acknowledged, have insured, and do hereby insure, the Baltimore Warehouse against loss or damage by fire, to the amount of ten thousand dollars on merchandise generally, hazardous and extra-hazardous, in or in trust, contained in that part of No. 2 Warehouse, lying between Frederick Street Dock and Long Dock, the end of a small street running by south side of Maryland Street; to cover whilst on the street or pavement around said warehouse, other insurance permitted without notice until required, or until the expiration of the term of the policy. In consideration thereof or of the premises, the president and directors of the Associated Firemen's Insurance Company, do hereby covenant, promise and agree to, and with the said company, their executors, administrators and assigns, to pay and indemnify the assured or their assigns may or may not be damaged by fire upon the property hereby insured, not exceeding the said sum of ten thousand dollars, if such loss or damage be sustained within the term of one year from the day of the date of these presents, which shall be deemed to expire at noon on the day of October, 1870." "In case the assured shall have any other insurance made on the hereby-insured premises, he shall cause the same to this corporation before or at the time of expiration of the policy, and cause the same to be indorsed thereon, otherwise the policy shall be void and of non-effect; and if the assured signs shall hereafter make any other insurance on the hereby-insured premises, he shall, with all reasonable diligence, notify the said corporation, and have the same indorsed on this policy, and the acknowledgment in writing by this corporation; or in default of this policy shall cease and be of non-effect. And it is hereby declared and agreed, that in case of any other insurance being made on the premises hereby insured, either prior or subsequent to the date of these presents, the assured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater amount of the loss sustained than the amount hereby insured shall be the whole amount of the several insurances made, or to be made on the premises insured by this policy."

Wherefore the "conditions of insuring" accompanying the policy are hereby approved, to wit:

That property held in trust or on commission are to be declared as such, otherwise the policy will not extend to cover such property."

Every policy of insurance made by this company shall be countersigned by its seal, signed by its president and attested by the secre-

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tary, and the person for whose interest the insurance is made be declared and named therein," etc.

"8. All persons insured by this company, sustaining any damage by fire, are forthwith to give notice," etc., "and as far as possible to deliver in a particular account of their loss and damage," etc., "and shall make oath," etc., "whether any and what insurance is made on the same property."

This witness, on his cross-examination, further said that the Baltimore Warehouse Company did not insure goods deposited by customers for amount of goods not insured by party; the notice in the charter was intended to notify depositors that their goods were not to be insured by the company, nor was the company to get insurance. The witness referred to the charter of the company, act of 1867, c. 10, sec. 10, last paragraph: "Every such receipt, warrant, or warehouse certificate shall contain on its face a notice that the property mentioned therein is held by this corporation as bailees only, and is not insured by this corporation."

Any statement of the witness as to the intention or purpose of the papers offered in evidence, and other than that shown by the papers themselves, was objected to by the counsel for the defendant, and inquired after by their question, but volunteered by the witness that the warehouse receipts, to wit, one of June 21st, 1870, numbered "1237" for fifteen bales of cotton, and the other, of June 28th, 1870, numbered "1238," for thirteen bales of cotton, being shown to him, he said he could not say whether these lots, or either of them, were among the cotton saved or lost; the value of the whole goods in the warehouse, at the time of the fire, was from \$120,000 to \$130,000.

Upon proceeding to examine this witness in reply, the question propounded: "You have stated, in your answer to a question asked by the counsel for the defendant, that you did not insure all the cotton in the warehouse of the Baltimore Warehouse Company, but only cover advances made by the company, in so far as they were not covered by specific insurance of the parties owning the cotton; would you say whose and what interest was it your *intention* to cover by the policies of insurance taken out by the Baltimore Warehouse Company in the 'Home,' of New York, and in the Associated Firemen's Insurance Company?"

The defendant's counsel objected to the admissibility of the evidence sought by the question, and the court sustained the objection and refused to permit the witness to answer the question.

The plaintiffs then offered to prove that at the time of applying

but the two policies taken by the Warehouse Company in 1870, the president of the Warehouse Company stated to the jury that the insurance companies applied to, that he desired to refuse to protect the Warehouse Company against any loss not covered by policies taken out by the depositors of cotton and merchandise in their warehouse, in which the Warehouse Company was interested; and upon objections made the court permitted the evidence proposed. The plaintiffs excepted.

*Exception.*—The plaintiff's counsel then propounded to the jury the question: "Did you or not, before the issuing of the policies in this case, and before the deposit of the cotton destroyed by the fire on July 18th, 1870, notify Hough, Clendening & Co. Warehouse Company would not effect insurance on their cotton stored in its warehouse, and that they must insure it themselves?" Upon objection made on the part of the defendant, the court refused to permit the witness to answer this question; and the plaintiff offered to prove, that before the issuing of the policies in this case, and before the deposit of the cotton destroyed by the fire on July 18th, 1870, the president of the Warehouse Company advised the plaintiffs that the Warehouse Company would not insure the cotton, and that they must insure for themselves, and that the defendant acquiesced in and not objected to by the plaintiffs, and the plaintiffs did thereupon for themselves insure all their cotton. Upon objection made on the part of the defendant, the court refused to allow to be admitted. The plaintiffs excepted.

*Exception.*—The plaintiffs further proved by George B. Snowden, having a certificate appended, signed by the committee, showing the conditions and expenses of the resinsorting, etc., of the cotton after the fire, the disposition and mode of distribution of the net proceeds. They further proved by this witness that the statement was made up by the committee, consisting of Snowden, White, Hartman, and the witness; there were two hundred and eighty-nine bales of cotton in all, identified as belonging to particular owners, and the proceeds on them; of these, seventy-five belonged to Hough, Clendening & Co.; these brought, at the auction sale, \$4,823.35, subtraction of \$297.25 for special expenses; their missing, and unidentified cotton, (six hundred bales,) was entitled, as their proportion of the proceeds of sale, to \$8,636.63, subject to deduction of their proportion of the expenses on the unidentified; the

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net proceeds of their cotton of both classes, was \$9,427.98 or (13.963), salvage to each bale of Hough, Clendening & Co.

They further proved by Bernard Hough, one of the plaintiffs, that the plaintiffs had policies covering six hundred and seventy-five bales of cotton in this warehouse ; each policy covered a specific lot of cotton ; the Warehouse Company was in the habit of advancing Hough, Clendening and Co., from time to time, as they made deposits.

On the cross-examination, the witness said, each policy covered the number of bales insured, as they were specifically insured. The Warehouse Company was in the habit of advancing Hough, Clendening & Co., on the various lots deposited from time to time, and Hough, Clendening & Co. insured the various lots as they were deposited.

On re-examination by the plaintiffs, the witness stated, it was the habit to take out policies on each additional lot of cotton as it came in ; they took out policies whenever they added additional cotton.

Thereupon the plaintiffs' counsel asked the witness to say whether he meant to say that it was his habit to effect insurance on each specific lot of cotton, or to effect insurance generally on an additional number of bales equal to the lot deposited ; the witness said that while the receipt of the cotton was the occasion of taking out the new policy, it was not meant to cover cotton only.

This testimony was objected to by the defendant, as explaining the intention of a party in a written contract ; the terms of the policy were clear, and it was excluded by the court ; and to this decision of the court to admit this testimony, the plaintiffs excepted.

*Fourth Exception.*—The defendant, to maintain on its part of the issues joined, proved by a witness, whose business in part was to adjust losses in insurance matters, that he was employed by the warehousemen to ascertain the loss, and protect their rights in salvage. The witness produced two papers containing the results of his adjustment. He said the general policies were divided up into contributing insurance in the ratio of the sound value of the property covered by specific policies to that covered by general policies ; the general insurance should have contributed at the rate of \$17.50 per bale to specific insurance. On twenty-eight bales the general insurance would have contributed \$490.00 ; the result would be affected by insurance on tobacco which was in the warehouse ; the salvage is to be credited to the defendant ; its proportion of saved cotton—some \$400.00—credited. Witness first applied the general insurance to the cotton not insured ; amount of this application, \$2,183.32.

examination the witness said the right of contribution the fact that the Warehouse Company had made advances of cotton covered by the specific policies, and by assign- specific policies to the Warehouse Company had made the insurance contributory ; if there were cotton there not ad- it was not included in the assignment ; \$8,536.71 were al- Hough, Clendening & Co. for difference of insurance, to hundred and nine bales; not considered as specifically in- re was cotton not covered, but no claim was made by any person. If general policies contribute to pay Ware- company's advances, they would be entitled, in witness's prerogation.

plaintiffs thereupon submitted to the court the following

jury shall find that the plaintiffs are entitled to recover, ascertaining the amount which the plaintiffs are to recover, not to make any abatement therefrom on account of the insurance issued by "The Home Insurance Compa- The Associated Firemen's Insurance Company" to the Warehouse Company, and offered in evidence by the de-

the true construction of the policy of insurance issued defendant to the plaintiffs, bearing date the 27th of June, 1870, in evidence by the plaintiffs, it covered not thirteen spe- of cotton, but any thirteen bales of cotton which were the plaintiffs in Tobacco Warehouse No. 2, on O'Donnell's were there remaining on the 18th July, 1870.

jury find from the evidence that the plaintiffs are entitled then, in ascertaining the amount of loss or damage which s are to recover, the jury ought to deduct such sum as dence in the cause they may find is the proportion due to t bales of cotton, in the distribution of the proceeds of rescued and saved cotton.

defendant prayed the court to instruct the jury as follows : plaintiffs have offered no proof upon which the jury can es for any injury by fire to the cotton insured by either es of the defendant which are in suit.

(Dobbin, J.) refused the prayers of the plaintiffs and prayer of the defendant. The plaintiffs excepted, and and judgment being against them, they appealed.

ST. M. C. O. D. V.

The cause was argued before BARTOL, C. J., GRASON, MILLER, and ALVEY, J.

JOHN A. INGLIS AND I. NEVETT STEELE, *for Appellants.*

FIELDER C. SLINGLUFF, AND S. TREACKLE WALLIS, *for Appellees.*

GRASON,

At the trial of this cause in the court below, the appellants, for the purpose of showing what goods and merchandise were intended to be covered by the policies issued to the warehouse Company by the Associated Firemen's Insurance Company and the Home Insurance Company, offered to prove by the president of the Warehouse Company that at the time he applied for the insurances, he informed the presidents of the insurance companies that he desired to obtain insurances to protect his company from loss or damage, not covered by policies taken out by those who had deposited cotton or other merchandise in the warehouse, and in which the Warehouse Company had an interest. Upon objection made by the appellees, the evidence was ruled to be inadmissible, and to this ruling the first exception was taken. When a contract is reduced to writing and is couched in plain and unambiguous language, courts must look to it alone to ascertain the intention and meaning of the parties, and parol proof is inadmissible. *Balto. Fire Ins. Co. vs. Loney*, 20 Md., 36; *Hendershew vs. Mayhew*, 2 Gill, 409. There was therefore no error in the ruling of the court below in this respect.

The appellants then offered to prove, that before the issuing of the policies sued on in this case, and before the deposit of their cotton in the warehouse, they were informed by the Warehouse Company that the latter would not insure the cotton so deposited, but that the appellants must insure for themselves, and that said notice was given and accepted in and not objected to by them, and that they did, thereupon, insure for themselves. This proof was objected to and ruled to be inadmissible by the court, and this forms the ground of the second exception. I concur in this ruling, as the evidence offered was totally irrelevant. Notice from the Warehouse Company that it would not insure cotton stored in its warehouse and belonging to the appellants, was unnecessary, and could not, in any manner, effect the rights or liabilities of the parties to this suit.

The third exception was taken to the rejection of evidence

ose of showing what was meant by the insurances of the  
ts of cotton procured by the appellants.

Hough had testified that it was the habit of the appel-  
e out policies on each additional lot of cotton as it came  
then asked to explain whether he meant to say that it  
it of the appellants to effect insurance on each specific lot  
to effect insurance generally on an additional number of  
to the lot deposited. The evidence, sought to be elicited  
tion, was intended to show what was the intention and  
the appellants in taking insurance, and the effect of the  
en out by them ; and, as we have already stated in consid-  
st exception, this could only be shown by the terms of the  
ch were issued. They constituted the contracts between  
and being free from ambiguity, parol evidence was not  
o explain them.

lees' prayer, which was granted, instructed the jury that  
o proof upon which they could allow damages for any in-  
to the cotton insured by either of the policies sued on.  
assumed that the policies sued on were specific as to the  
thirteen bales respectively, as well as an absence of ev-  
ow whether the two specific lots so insured were included  
ty-five bales, which sustained partial injury only, and were  
s belonging to the appellants, or whether they were in-  
e mass which was destroyed. We have no doubt that the  
specific, and not general. The appellants began to depo-  
the warehouse mentioned, on the 5th day of February,  
ued to deposit, at intervals, until the 15th of July, 1870,  
days before the fire occurred, and for each lot deposited,  
m the Warehouse Company a receipt, warrant or certifi-  
r, which specified the number of bales and the date of the  
l also the mark on the bales, the letters X. Q. being  
each bale deposited by the appellants. These receipts or  
were all numbered, and that for the fifteen bales deposited  
of Jcne, was numbered "1221," and the one for the thir-  
e deposited on the 27th of June, was numbered "1238." Po-  
urance were at once taken out to cover the particular num-  
deposited, and on their face the loss, if any, is made pay-  
Warehouse Company, and the policies and warehouse re-  
delivered to the Warehouse Company to secure advances

On the policy on the fifteen bales, dated 21st of June,  
orsed in pencil the number in figures, "1221," and on that

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LIBRARY  
JUL 25 1870  
BY

on the thirteen bales, dated 27th of June, also in pencil, "1238." It does not appear in proof by whom these numbers on the policies were indorsed, but it seems clear that they were indorsed there on for the purpose of corresponding with the number of the warehouse receipts given for the particular cotton insured, so that the same might be more readily identified.

It is also shown that at the time of each deposit, the depositor reserved a sample of the particular lot deposited. All these facts go to show that the intention of the contracting parties was to effect a specific insurance on each particular lot of cotton as it was deposited in the warehouse. But independently of these facts, and looking to the terms of the policies alone, it is manifest that each policy is specific, and covers no cotton but the specific bales to which it refers. The amount of the liability of the insurance company is limited in each policy to a specific sum, and the policies bear date on the day, or the day after, the cotton is deposited. Can it be pretended that a policy issued on the 27th of June, to cover thirteen bales deposited on that day, is to be held to cover thirteen other bales deposited long before, and which had been previously insured, or that the policy issued the 5th of February on thirty-eight bales can be said to apply to the same number of bales deposited in July thereafter, when, for aught we know to the contrary, the appellants had not on the 5th of February a bale beyond the thirty-eight bales first deposited? The true construction of each policy issued is that it covers, and was intended to cover, only the specific number of bales in each deposit, and the insurance on which was effected at the time of the deposit; the policy of the 21st of June, 1870, covering only the fifteen bales deposited on the 20th of June, and the policy of the 27th of June, thirteen bales deposited on that day. But while we are of opinion that the policies sued on are specific and not general, we think that there was evidence in the cause to show damage to the cotton deposited in the warehouse on the 20th and 27th of June respectively, and covered by the policies sued on. It is true there is no evidence to show whether this particular cotton was among the seventy-five bales which were identified after the fire, as belonging to the appellants, or was among that which was destroyed; but the proof leaves no room for doubt that it was included in one or the other class, and was damaged, if not destroyed.

It was incumbent upon the appellants, in order to recover for a total loss, to show that the cotton insured was wholly destroyed, and having failed to show this, it must be assumed that it was only partially damaged. Proof was offered that these two lots of cotton were

weighed at the time 'they were stored in the warehouse, the fifteen bales weighing six thousand two hundred and sixty-one pounds, and the thirteen bales five thousand four hundred and eighty-two pounds, making in the aggregate eleven thousand seven hundred and forty-three pounds, and that a fair class of "low middling cotton was worth in the market eighteen and three quarter cents per pound. It was also proved by Mr. Rhett, that he had examined the several samples of the cotton stored by the appellants in the warehouse, and that they graded from "good middling" to "low middling" and "ordinary," the whole averaging a fair class of "low middling," thus showing that the market value of the cotton insured and injured by the fire, was eighteen and three quarter cents per pound. Proof of the extent of the damage was also furnished by the list of the sales of the cotton which was partially damaged and identified, so that the extent of the loss of the appellants could have been easily ascertained by the jury. It was therefore error to grant the prayer of the appellees, and thus to take the case wholly from the jury.

As we have shown that the policies sued on were specific and not general, it follows that the second and third prayers of the appellants were erroneous, and were properly rejected.

The court below, having granted the appellees' prayer, refused the fourth prayer of the appellants as unnecessary. But as we have shown that the appellees' prayer ought not to have been granted, because there was evidence of loss upon which the jury should have been permitted to pass, the appellants' fourth prayer ought to have been granted, as it states the correct measure of damages to be recovered.

The appellants' first prayer asked an instruction that the jury are not to make any abatement from the damages, (if the verdict should be for the plaintiffs,) on account of the two policies of insurance by the Home Insurance Company, and the Associated Firemen's Insurance Company, to the Baltimore Warehouse Company.

The policies in the "Home" and "Associated Firemen's" companies were taken out by the Baltimore Warehouse Company, while the policies in the company of the appellees were issued to Hough, Clendening & Co., loss, if any, payable to the Baltimore Warehouse Company. In the case of *The Nat'l Fire Ins. Co. vs. Crane*, 16 Md., 293, a policy had been issued to James L. Gray & Bro. against damage by fire to property in Baltimore city, "the loss, if any, payable to William Crane & Co.," and the Court of Appeals held that this language was an admission that Crane & Co. had an interest in the



contract and were to receive the benefit of it, and that the policy might be regarded as having been, at its inception, assigned to them with the assent of the company. See also *Brown vs. The Roger Williams Ins. Co.*, 5 Rho. Isl. R., 394. In the case before us, the proof shows that the Warehouse Company had advanced to Hough, Clendening & Co. over forty-eight thousand dollars upon the cotton belonging to them and stored in the warehouse, and the Warehouse Company had therefore a lien upon it for such advances, as well as for storage, which constituted an insurable interest in the cotton. The policy in the Associated Firemen's Company was for ten thousand dollars, and insured the Warehouse Company against loss by fire, for one year "on merchandise generally, hazardous or extra hazardous, held by them or in trust, contained in that part of No. 2 Warehouse, used by them, etc., to cover whilst on the street or pavement around said warehouse." The policy in the "Home" company is nearly in the same language, but is for twenty thousand dollars, and "on merchandise, hazardous or extra hazardous, their own, held by them in trust, or in which they have an interest or liability." In the policies to the appellants, as well as to the Warehouse Company, are stipulations that in case of loss, the insured shall not recover any greater proportion of the loss or damage sustained to the subject insured, than the amount thereby insured shall bear to the whole amount insured.

The law seems to be well settled that a person having goods in his possession as consignee, or on commission, may insure them in his own name, and in the event of loss, recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner. *Story on Ag.*, sec. 111; *Ætna Insur. Co. vs. Jackson & Co.*, 16 B. Munroe, 258; *DeForrest vs. Fulton Insur. Co.*, 1 Hall, 126; *Lee vs. Adsit*, 37 N. Y. Rep., 90; *Waters vs. Assur. Co.*, 85 E. C. L. Rep., 879; *London and Northwest. R. W. Co. vs. Glyn*, 102 E. C. L. Rep., 660; *North British Insur. Co. vs. Moffitt*, Law Rep. for Jan., 1872, p. 31; *Siter. et al. vs. Morris*, 13 Penna. State Rep., 219.

The policies issued to the Warehouse Company by the "Home" and "Associated Firemen's," cover not only the property belonging to the Warehouse Company, but also all which was held by it in trust, or in which it had an interest. By goods "held in trust" are meant goods with which the insured is intrusted, "not goods held in trust in the strict technical sense—so held that there was only an equitable obligation in the assured, enforceable by a *subpœna* in chancery—but

goods with which they were intrusted, in the ordinary sense of the word." *Waters vs. Assur. Co.*, 85 Eng. C. L. Rep., 879. It seems clear, therefore, that the cotton of the appellants was insured by the two policies issued to the Warehouse Company, and that it can recover not only to the extent of its interest in the property insured, but to the extent of the loss, unless the right of recovery to that extent is limited by some provision or condition of the policies. The policies sued on having on their face been made payable to the Warehouse Company, they inured to the benefit of that company, and may be considered as in favor of the same assured, on the same interest in the same subject, and against the same risks, as the policies which were issued directly to the Warehouse Company by the "Home" and "Associated Fireman's" companies. They are therefore what are termed double policies, (*Sloat vs. Royal Ins. Co.*, 49 Penna. State Rep., 18,) and the insurance companies issuing them are bound to contribute their respective proportions of the loss. *Merrick vs. Germania Fire Insurance Company*, 54 Penna. State Rep., 282 ; *Flanders on Fire Insurance*, 40 ; *Ætna Fire Insurance Co. vs. Tyler*, 16 Wend., 396, 400 ; *Baltimore Fire Insurance Co. vs. Loney*, 20 Md., 38. The appellants' first prayer was therefore properly refused.

As the court below erred in granting the appellee's prayer, and in rejecting the fourth prayer of the appellants, the judgment appealed from must be reversed, and a new trial awarded.

Judgment reversed and new trial awarded.

## COURT OF APPEALS OF NEW YORK

*Appeal from General Term of Supreme Court.*SANDS, *Respondent.*

vs.

NEW YORK LIFE INS. CO., *Appellant.\**

The defendant, an insurance company incorporated in New York, issued, in January, 1850, a policy of insurance upon the life of the plaintiff's husband, who resided at Mobile, Alabama, for the term of his natural life. The insured died at Mobile in July, 1862.

All the premiums upon the policy were paid up to January, 1862, and the premium due in January of that year was paid, in Confederate treasury notes, to the agent of the company at Mobile, who was appointed before the civil war, and through whom the policy was issued.

*Held*, that the contract of insurance was not nullified by the war. A valid debt by note, bond or contract, existing when the war began, against a citizen of a Confederate State in favor of a citizen of a Northern State, was not nullified by the war. It was suspended until peace returned.

Dicta of judges should always be construed with reference to the case then before the court.

Contracts for the insurance of the enemy's property, of affreightments, and of commercial copartnership, are avoided thereafter by the breaking out of the war, because they are inconsistent with the interests and policy of governments whose policy is, by the war, to destroy and cripple the enemy's property and commerce.

But the rule that makes such contracts void has no application to life insurance. This contemplates no commercial intercourse and no aid or comfort to the enemy, in violation of governmental policy.

The law does not presume that an honest debt due an alien enemy will be paid over to him during the war, even though paid to his resident agent.

The right to receive or collect the amount of insurance upon a policy becoming payable during war, is suspended until peace is restored.

A policy insuring the enemy against death in the enemy's army would be void, and an exception against such a loss would be implied in the contract as being illegal.

No forfeiture of the policy for non-payment of premium would arise during the war, provided the premiums, with proper interest, were promptly paid on the return of peace.

The agent of the company at Mobile was the lawful agent of the company during the war, and had power to receive the premiums.

The payment in Confederate notes was a valid payment.

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\* Decision rendered January 21st, 1873.

N. DAVIS, *for Appellant.*

G. D. F. LORD, *for Respondent.*

This was an appeal from an order and judgment of the General Term of the Supreme Court of the First Judicial Department, reversing a judgment entered on the report of a referee, dismissing the complaint with costs and ordering a new trial. The facts of the case appear in the opinion.

PECKHAM, J.

Action to recover the amount of a policy of insurance issued by defendant to the husband of the plaintiff, then a resident of Mobile, in Alabama, on the 28th of January, 1850, whereby, in consideration of one hundred and sixty dollars then paid, and of the annual payment thereafter of a like sum during the continuance of the policy, the defendant agreed to insure him in the sum of \$5,000.00, "for the term of his natural life." Sands died at Mobile in July, 1862.

It is admitted that all premiums were paid on the policy up to January, 1862, and it is proved and found that the premium due in January, 1862, was paid to one Muldon, the agent of the defendant at Mobile, appointed prior to our civil war, and through whom this policy was issued, and it was paid in Confederate treasury notes, then substantially the only currency of the so-called Confederate States, for the general business of those States, and although not made a legal tender for the payment of debts, it was so used, and was then very generally received at par in payment of debts and for the purchase of property, although it was at a discount for gold of about twenty per cent. This currency was received by Muldon, the general agent of the defendant, as money.

The defendant now objects to the payment of the insurance upon various grounds. Its counsel insist that the war made the contract void. That the contract was executory, to be renewed each year by payment of the premium, or it became void, and hence such contract became utterly void by the war. That it was void as requiring commercial intercourse between States at war. That at any rate the agency of Muldon was avoided by the war. Hence that he had no authority to receive payment of the premium in January, 1862, and certainly not in Confederate notes.

It is certainly true that all contracts with citizens of Confederate States are not made void by the war.

It is against sound principle and at war with the lights of the age, that the debts of individuals should be impaired by national differences—debts, be it understood, that existed by virtue of contracts made prior to the war. *Clark vs. Morey*, 10 J. R. at 73.

This contract of the parties I do not think was nullified by the war. What was it? As presented in the complaint, and found by the referee, it is a contract of insurance by defendant for the life of the insured, for the consideration of so much money received and the annual payment of \$160.00 during the continuance of the policy. It was a valid policy for the life of the insured, to become void by the omission to pay the agreed annuity. In principle I do not see why it is not like a lease or grant of lands in fee, reserving rent to become void if the rent is not paid, if the condition subsequent be not complied with.

I do not say that it would bar the plaintiff's recovery if the contract were as the defendant insists it is. It is enough to say that such is not this contract.

The agreement is to insure for the life of the assured. Subsequent failure to pay the annuity when due defeats the policy. It is a condition subsequent, not precedent.

Is this contract criminal or illegal as contravening the policy of the government? If it be, if it give aid and comfort to the enemy, it is nullified by the war.

It is insisted that it is void because it intends and implies commercial intercourse between citizens of hostile States—"locomotive" intercourse as it is termed—and if it do it is annulled by the war. *Woods vs. Wilder*, 43 N. Y., 167; *Griswold vs. Waddington*, 16 J. R., 438; *Clarke vs. Morey*, 10 J. R., 68; *United States vs. Grossmayer*, 9 Wallace, 72.

Clearly it is not law, nor do these or any recognized authorities intend to hold that a valid debt by note, bond or contract, existing when the war began, against a citizen of a Confederate State, in favor of a citizen of a Northern State, was nullified by the war. The debt is suspended until peace returns. It is not destroyed. *Buchanan vs. Curry*, 19 J. R., 137; *Bell vs. Chapman*, 10 J. R., 182; *Clark vs. Morey*, 10 J. R., 68; *Exparte Boussmaker*, 13 Vesey, 71; *Semmes vs. Hart. Ins. Co.*, 13 Wallace, 158;\* "Prize cases," 2 Blatch., at 687; *Kerchelson, J.*; *The Protector*, 9 Wall., 687; *United States vs. Wiley*, 11 Wall., 508.

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\*1 *Ins. Law Jour*'l, p. 603.

Nor would it make the least difference as to the validity of the claim by contract that it was for the purchase of a farm of a citizen in a Confederate State, upon which contract large payments had been made, and one or two yet remained unpaid, even though it were expressly stipulated that if the after payments were not made when due, the contract should be void and the purchaser should forfeit as liquidated damages all payments heretofore made thereon.

The war would suspend such a contract until peace. *Semmes vs. Hart. F. Ins. Co.*, *supra*, and other cases.

There is no principle upon which war could annul it. This is so irrespective of the question of real or personal estate involved. Such a contract affords no aid or comfort to the enemy. It requires no "locomotive" intercourse, unless such intercourse be required by a bond or note past due.

The principle involved in such a contract would be the same if it contained no provision as to its becoming void; but only provided for the execution of a deed upon the payment being made as therein provided.

Yet such a contract would be nullified by the war according to some text-books, and by the dicta of some judges. The payments not being all made when the war commenced, there was no vested right to a deed. Some acts, therefore, remained to be done "by or between the parties during the war." Hence they say it was abrogated by the war.

One writer says it is "probably" void "as to all acts to be performed during the war." 1 *Duer on In.*, 478. This was assuming to lay down a general rule after dismissing. *Griswold vs. Waddington*. Some dicta of judges say that all *contracts* are "annulled by the war." Authorities sustain neither position. It is really of no moment whatever whether these payments were optional with, or obligatory upon the assured, as to this question. The payments were all to be made by virtue of and under a contract made before the war. Such a contract could not be nullified by the war, unless it was hostile to the policy of the government—at war with its interests. Dicta of judges should always be construed with reference to the case then before the court.

The general rule undoubtedly is that it is only commercial contracts, such as give aid and comfort to the enemy, or are forbidden by or against the policy of the government, that are void as to all acts

to be done during the war, though the contracts were made before the war.

Contracts for the insurance of the enemy's property, of affreightment and of commercial co-partnership, are avoided thereafter by the breaking out of the war ; because they are inconsistent with the war—inconsistent with the interests and policy of a government whose purpose is by the war to destroy or cripple the enemy's property and commerce. *Furtado vs. Rogers*, 3 Bos. & Pul, 191. *Kellner vs. Le Mesnier*, 4 East, 395, and the two cases following ; *Kershaw vs. Kelsey*, 100 Mass, 561.

This last case, in an able review of the authorities, holds a lease made by a citizen of Massachusetts in a Southern State, entered into thereafter [?] the war, to be valid, and that the lessee was liable for the unpaid rent. *Clark vs. Morey*, *supra*.

The rule that makes such contracts as before alluded to void, has no application to life insurance. This contemplates no commercial intercourse, no aid to the enemy's commerce, no aid or comfort to the enemy in violation of governmental policy. It is idle to say that it fosters or implies commercial intercourse.

That money falls due annually to the defendant, for the premiums during the war, does not make the contract void, any more than would installments of debt, falling due upon a bond or note given before the war, render the note void. That is not commerce or commercial intercourse.

The law does not presume that an honest debt due to an alien enemy will be paid over to him during the war, even though paid to his resident agent. *Buchanan vs. Curry*, 19 J. R., 137. *Dennisson vs. Imbrie*, 3 Wash. C. C., 396. *Ward vs. Smith*, 7 Wall, 447.

Nor is it made void by the fact that the policy itself might have become payable during the war. It would be no more void for that reason than if a note or bond, given before the war, should so fall due. The right to receive or collect it by the representatives of the assured is suspended until peace is restored.

Why is not the note or the bond given before the war made void by the war ? Simply because the interests of government do not require it. (Their validity is not hostile to the government.) Because it is the settled policy of government to impair as little as possible the private rights of citizens by national differences. *Clarke vs. Morey*, 10 J. R., 68. *Bradwell vs. Weeks*, 13 J. R., 1 ; 7 Peters, 586.

That this contract of insurance cannot possibly operate in hostility to the government or its policy in the war, I think is entirely plain.

If it insured the enemy against death in the enemy's army, it would of course be void, because then, although it gave to the assured no benefit to himself, yet it gave it to his family by his death.

But it insured against no such loss. An exception against such a loss would be implied in the contract as being illegal, but it is plainly expressed here. The policy provides : "If he should enter into any military or naval service whatever, or if he should die in the known violation of any law of the United States, the said policy shall be null and void."

It is insisted that men as well as money are necessary to the war. True, but this insurance is a direct reward to keep men out of war. If they go in, the policy is instantly void.

It may be regarded, therefore, so far as it operates at all as a direct premium, to prevent the filling up of the enemy's army.

Again, it is not the purpose or policy of government to destroy mere non-combatants in the enemy's country—civilians, not belonging to the army. It is the rule of all civilized warfare to protect such persons—to shield them from injury. Then why should this insurance be condemned as to its ultimate object ?

Again, it would not be claimed that an annuity purchased from an enemy before the war, and paid for, was made void by the war, though payable any number of times during the year. Yet the difference in principle is not apparent between that and the case at bar. The only difference in form is that there the annuitant paid in full for the annuity, and receives back his annuity in installments. Here he pays by annual installments, and receives it back in gross by his representatives.

If it be unlawful to pay the annuity during the war by international intercourse, then it must not be paid in that way. But there is no pretense of avoiding such an annuity by the war, because it might by possibility, like any other, be improperly paid. See *Buchanan vs. Curry*, and other cases, *supra*.

Well considered cases hold that payment of these annual installments is not like the cases made void by war of affreightment and commercial co-partnership. It being a single act, or an annual act, instead of a continual business. *Clopton vs. N. Y. L. Ins. Co.*, 7 Bush., 179. *Hamilton vs. Mu. L. Ins. Co.*, by Justice Blatchford, in S. Dist.\* *Manhattan L. Ins. Co. vs. Warwick*, 20 Grat., 61. † This is reasonable. But the stronger ground, in my opinion, is that the contract having been made before the war, and it being of the char-

\* *Ins. Law Jour* 1, 573.

† *Ins. Law Jour* 1, 115.



acter before described, its fulfillment afterward is not against the purpose or policy of the war. Cases of marine insurance, of insurance against capture by the enemy on the sea, and contracts of affreightment, have no analogy to this.

This contract, therefore, was neither illegal nor criminal.

It is urged that the last premium was not paid, and hence the policy became void.

If it was not paid I do not think the consequences claimed would follow. The war suspended this contract, and no forfeiture for non-payment would arise while the war lasted, provided the premiums with proper interest were promptly paid on the return of peace.

It is clear that this state of things was a surprise to both parties. They made no provision for a war. If they had, it is equally clear that they would never have provided for such an inequitable result as the defendant now claims.

It is urged that these payments at the time required are a condition precedent to the right to the insurance, which nothing can excuse, not even an act of Providence can dispense with.

Without stopping to question this position, it is clear that war, in this respect, then, can accomplish what cannot be done otherwise. War extends the statute of limitations. (*The Protector*, 9 Wall, 687; *Hanger vs. Abbott*, 6 Wall, 532,) not only against citizens, but against the United States. *U. S. vs. Wiley*, 11 Wall, 508.

It is equally a condition precedent to a right to recover on a policy that the action shall be brought within the time specified in the policy. The parties have an undoubted right to contract to fix a short statute of limitations obligatory in the given case. Yet war annuls that limitation, if necessary, and the action may be brought wholly irrespective of that provision of the policy. So held in *Semmes vs. Hart. Ins. Co.*, 13 Wall, 158,\* where that was the sole point of the case. If such be its effect upon that provision, there is no reason why it shall not save from forfeiture from this condition precedent of payment of the premium when due.

It is the fault of neither party that it is not paid, and war suspends contracts like these, but does not destroy them.

Nor is there any injustice to the defendant. Of course there is none in the present case, where the assured had confessedly paid for twelve years and died in six months thereafter. In fact, had paid the last premium.

But justice is generally done by requiring the payments promptly

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\* 1 Ins. Law Jour'l, 663.

after the war ceases, with proper interest. The companies do no more than invest their money upon interest.

If some fail thus to pay, of course they lose all they have paid, which cannot injure the company.

Symptoms of war are usually quite plainly visible before it comes, and insurers may observe and cease to insure, so that generally a reasonable advance in premiums is made by the assured before the war comes.

Cases may possibly occur where the company might lose by the failure to pay by the assured when peace is restored. In ordinary business they would be rare.

But the great injustice would be generally to the assured by this forfeiture.

It is sought to compare it to commercial co-partnership, to which it has no analogy. But even such a partnership is avoided only as to the future. Past transactions and liabilities are valid. But here, if this contract be made void, all past transactions are made void. The assured would lose all his payments upon the grounds claimed by the defense.

But no such question arises here, as the premium was paid.

The defendant had a general agent in Mobile when the payment was made, as it lawfully might, to receive the demands due the company. That it had an agent, in fact, in January, 1862, when the premium was paid, is proved and found by the referee. His continuance, after the President's proclamation, was expressly recognized by the defendant by letter of the 21st August, 1861.

That he was lawfully defendant's agent is settled. See cases before cited, *Buchanan vs. Curry*, 19 J. R., 137, where the point was involved; *Denniston vs. Imbrie*, 3 Wash. C. C.; *Ward vs. Smith*, 7 Wall.; *Conn. vs. Penn.*, 1 Pet. C. C., 524; *U. S. vs. Grossmeyer*, 9 Wall.; *Robinson vs. Inter'l L. Assur. Society*, 42 N. Y.; *Kershaw vs. Kelsey*, 100 Mass.

It is urged as a ground of injustice to defendant that if the money was paid to defendant's agent at Mobile, it might and would be confiscated to the enemy's government. True, so might any debt due from an alien enemy, but that reason would not invalidate the debt.

That the payment in Confederate notes was a valid payment is decided. *Robinson vs. Inter. L. Ins. Co.*, *supra*; *Polglass vs. Oliver*, 2 Crompt. & Jer., 14.

That a contract like this was not avoided by the war is adjudged in the cases cited of *Buchanan vs. Curry*, 19 J. R., which has never

been overruled. And the following authorities are in point to sustain this action. *Clapton vs. N. Y. L. Ins. Co.*, 7 Bush., 179 ; *Hamilton vs. M. L. Ins. Co.*, 9 Blatch., 234 ;\* *Manhattan L. Ins. Co. vs. Warwick*, 20 Gratt., 626, † and I am not aware of any case to the contrary.

The judgment should be affirmed.

Peckham, J., reads for affirmance of order and judgment absolute for plaintiff. Church, Ch. J., Allen, Folger and Andrews, JJ., concur ; Grover, J., not voting ; Rapallo, J., having interest in question, not voting.

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## SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1872.

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*Appeal from Superior Court of Cook County.*

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COMMERCIAL INS. CO., *Appellant*,

vs.

ISAAC S. ROBINSON, *Appellee*.†

The policy provided that the company should not be liable for any loss or damage by fire, caused by means of an invasion, insurrection, riot, civil commotion or military or usurped power, nor for any loss caused by the explosion of gun-powder, camphene, or any explosive substance, or explosion of any kind.

Equivocal expressions in a policy of insurance, whereby the company seeks to narrow the range of the obligations it professes to assume, are to be interpreted most strongly against the company.

The clause in regard to explosions secures exemption from liability for losses caused by explosion, but not from liability for losses by fire caused by explosion.

The clause refers to loss by explosions simply, without reference to fire.

The insured furnished the company with an inventory of the goods damaged and destroyed by the fire, which was all that was required by the policy, and the company expressed its dissatisfaction with the inventory.

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\* 1 Ins. Law Jour<sup>l</sup>, 573.

† 1 Ins. Law Jour<sup>l</sup>, 115.

‡ Decision rendered February 7th, 1873.

The company might have insisted on the appointment of appraisers, but having failed to do so, it was not incumbent on the insured to move further in the matter.

LAWRENCE, C. J.

The policy, in this case, provided that the company should not be liable "for any loss or damage by fire, caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power, \* \* \* \* nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind.

The main question is as to the construction to be given to this last clause. It is contended by counsel for the company that it protects the company from liability for any loss by fire where the fire has been produced by an explosion. It is insisted on the other hand, by counsel for appellee, that the clause protects the company only against losses occasioned directly by an explosion, and not against losses from fire where the fire has been caused by an explosion.

Counsel for appellant in support of their position cite *St. John vs. Am. Mut. Ins. Co.*, 1 Kernan, 516; *Hayard vs. Liverpool and London Ins. Co.*, 7 Bosw., 385, and *Stanley vs. Western Ins. Co.*, 3 Exch., 71. In the case in 1 Kernan the Court of Appeals was divided. We have read the opinions of the majority and minority of the court, and consider the reasoning of the latter the more satisfactory. Even the majority of the court did not agree upon the grounds for affirming the judgment of the lower court. As pointed out in the dissenting opinion, the judgment was affirmed not merely upon different but adverse reasons.

The case is therefore worth little as authority. The case in 7 Bosw., is not correctly stated by counsel for appellant. In that case there were two clauses in the policy; counsel gave but one. The other was explicit, and in terms excluded liability for losses by fire arising from an explosion. The English case cited is in point for appellant. If this were a question as to an alleged rule or principle of the common law, with these authorities cited on the one side and none upon the other, we might repose securely upon them and hold them decisive of the case before us. But it is simply a question as to the interpretation of a few words in a written instrument, which are susceptible of two different interpretations. We are to determine which is the more reasonable construction, and if our judgment is satisfied on this point we must accept its conclusions though differing from those of the courts to which reference has been made. Let us

remark, in the first place, that equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company. *Aurora Fire Ins. Co. vs. Eddy*, 49 Ill., 106. The companies have the preparation of their own policies, the choice of language in which to express their obligations, and they show a studious solicitude to limit their liability. Their policies are prolix with provisions of this character, and the public must accept them or go without insurance. We have no right to censure the companies for this, and do not ; but the reading of a policy furnishes a sufficient reason for the rule of interpretation formerly laid down by this court.

It will be observed that in a clause of the policy preceding the one under consideration, the company stipulated that it should not be liable for any loss or damage *by fire\** caused in a certain manner.

But the clause under consideration leaves out the words, "by fire." It secures exemption from liability for losses caused by explosion, but not from liability for losses *by fire* caused by explosion. The difference in phraseology between the two clauses is so marked, that when we consider their connection with each other, we cannot resist the conclusion that the difference was intended.

Whether the difference was intentional or not cannot be certainly ascertained, but it is reasonable to resolve the doubt against the company. The object of the company's existence is to insure against fire. That is what it holds itself out to the public as able and willing to do. When a person takes out a policy and pays his premium he takes it for granted, without reading his policy, that he cannot [but] make the risk more hazardous to the company by storing highly inflammable materials upon his premises. He knows that would be acting in bad faith with the company, and that the policy has probably provided against it, but he would have no reason to suppose that among the voluminous stipulations of the policy there would be found one intended to deprive him of its benefit because a fire, which has destroyed his property, originated in another house a half mile distant, in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy, contended for by the company, would make the assured assume the liability for the carelessness of others.

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\* Caused by means of an invasion, insurrection, etc. Here exemption is specially secured against liability for losses *by fire*.

He is thus deprived of the very protection he seeks by his insurance, if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire of Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property then destroyed.

Counsel for the company, feeling the unreasonable character of this condition with their interpretation in cases where the fire comes from an explosion on other premises, speak of it as if it referred only to explosions on the premises of the assured. But the policy will bear no such construction or limitation. We must either hold that the clause refers to loss by explosions simply, without reference to fire or to losses by fire caused by explosion anywhere, whether on or remote from the premises. There is no middle term. It must receive one of these constructions or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would make fire insurance a mere mockery. We cannot hesitate which construction to choose. But, say the counsel for appellant, this company does not profess to insure against losses by explosion but only by fire, and the clause, construed as we construe it, is unmeaning, or at least, useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss.

Suppose fire is carelessly applied to powder or other explosive substance; an explosion follows, which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss caused by fire. The courts might not so hold, independently of the clause in the policy, but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a case where a fire is speedily subdued, but before it is it has ignited powder and an explosion has taken place which has caused much damage but has not extended the fire. In such a case the company would claim they were protected by this clause from liability for the consequences of the explosion. It is not necessary, however, for us to show how the clause was designed to operate. It is sufficient to

say that, in our judgment, it cannot receive the construction claimed by the company.

It is urged that the stipulations of the policy were not complied with in regard to an appraisalment. An inventory of the goods burned or injured was furnished to the company ; they expressed their dissatisfaction with it and might have insisted on the appointment of appraisers. They made no offer to have them appointed and it was not incumbent on the appellee to move further in the matter. He did what the policy required him to do when he furnished the inventory.

Judgment affirmed.

## THE KNICKERBOCKER LIFE INSURANCE COMPANY.

SUPREME COURT OF NEW YORK.—APPLICATION FOR INJUNCTION AND RECEIVER.

*John Anderson and Allen R. Walker vs. The Knickerbocker Life Insurance Co. and Charles Stanton.*

JOHN K. PORTER and E. R. ROBINSON for plaintiffs.

DAVID DUDLEY FIELD and HENRY W. JOHNSON for defendants.

The plaintiffs in this case filed their complaint as stockholders of the Knickerbocker Life Insurance Company, praying for a dissolution of the company on the ground of its alleged insolvency, and that an injunction issue against its officers restraining them from exercising its corporate rights and franchises, and that a receiver of its assets be appointed. Charles Stanton was joined as a party defendant upon the alleged ground that he had received certain commissions on loans and policies which he was bound to account for, and that through his negligence as an officer of the company, certain losses had occurred for which he was liable to the company. To sustain the allegation of insolvency, the complaint averred that the liabilities of the company, exclusive of its capital stock, were not less than \$734,120.01 in excess of its assets. This deficiency was chiefly made up of the following items, to wit : an indebtedness of Henry Lassing, a defaulting agent, amounting to \$263,369.86, which it was alleged was reported to the Insurance Department as an "admitted asset" of the company, and included in the estimate of its solvency ; a liability of \$360,856.96 for the reserve on its reversionary additions to its policies, which it was alleged was not reported to the department ; losses to the amount of \$65,000, reported to the company and not included in its annual report ; and an over-valuation of \$60,000 of property mortgaged by M. Pinner to the company.

Upon the complaint, and affidavits in support of it, the plaintiffs



moved, before Mr. Justice Fancher, at a special term of the court held in the city of New York on the 31st of March, 1873, for an injunction and receiver, as prayed for in the complaint.

In answer to the motion, affidavits were read on the part of the defendants, flatly contradicting every allegation of the complaint. As to the Lassing indebtedness, the affidavits of the actuary and of the secretary of the company were read, showing that they made out the annual report of the company, and that this item *was not included* among the "admitted assets." The affidavit of the latter also showed that the item was much smaller than was alleged in the complaint. The allegation in regard to the liability of \$360,856.96 was met by the affidavit of the actuary, showing that the reversionary additions *were reported* to the department, and by a certificate of the superintendent, stating that the reserve upon them was computed by him in ascertaining the liabilities of the company. It was also shown by the affidavits of the actuary and secretary that the plaintiff Walker was in the employ of the company at the time the annual report was made ; that he had charge of the "loss-book ;" that all the losses reported by him to the actuary were included in the report ; that they knew of no others, and that he assured them that there were no others. Several affidavits were also read, showing that instead of there being an over-valuation of the property mortgaged by Pinner to the company, the security was ample, the loans being in the aggregate only \$80,000.00, while the property was worth over \$400,000.00.

The affidavits read on the part of the defendants, in addition to contradicting all the allegations of the complaint, charged that the action was the result of a conspiracy between the plaintiff Walker and one Erastus Lyman, the former president of the company, and in support of the charge the following facts were stated, which the plaintiffs did not deny or ask leave to answer or explain, namely :

That the plaintiff Walker was a protégé of Lyman, and had been his confidential clerk, and had lived, and was then living in his family ; that in the early part of 1872 they concocted a scheme to change the board of directors, in which they were foiled, and which resulted in both of them being compelled to leave the service of the company ; that Walker never was a stockholder of the company until the 18th day of January, 1873, when Lyman transferred to him 85 shares of stock to enable him to become a party to this action ; that the only consideration for the transfer was a note of \$2,000.00 executed by Walker to Lyman, which was the same day indorsed by the latter and discounted by the plaintiff Anderson ; that at the

same time Lyman executed to Anderson a bond in the penalty of \$5,000.00, conditioned to indemnify and save the latter harmless as to the cost and expenses of this action, and that to secure the payment of this note and the performance of the conditions of this bond, Lyman, on the same day, executed to Anderson a mortgage on certain real estate in the city of New York.

After argument, Judge Fancher took the papers, and two days thereafter he denied the plaintiffs' motion with costs, delivering the following opinion :

"The complaint and affidavits on the part of the plaintiffs make out a *prima facie* case for the granting of an injunction and the appointment of a receiver.

"But the opposing affidavits read on the part of the defendants demonstrate beyond doubt the groundlessness of the plaintiffs' supposed case. In view of all the facts set forth in these voluminous affidavits on the part of the defendants, which seem to have been prepared and verified with due care and caution, I think no room remains for even a suspicion against the solvency of the Knickerbocker Life Insurance Company. If a different opinion be entertained by the plaintiffs, the law confers ample powers on the State Superintendent of Insurance to investigate officially all the affairs of the company and to protect the interest of all parties concerned.

"The motion for an injunction and receiver must be denied, with costs."

After the delivery of Judge Fancher's opinion, and on the 9th of April, the plaintiff's attorney appeared before him, and asked leave to discontinue the action, which was granted on payment of defendants' costs.

#### NOTE.

The break in the paging—389 to 400—is caused by the omission of some current editorial matters from this number. These are left out from the 1884 reprint as of no permanent value. All the cases are retained in full.—ED. INS. LAW JOURNAL.

## CURRENT TOPICS.

—We have received transcripts of decisions in the following cases :

*Schwartz vs. Germania Life Ins. Co.*—*Min. Supreme Court.*

*Andes Ins. Co. vs. Heck.*—*Ill. Supreme Court.*

*Home Ins. Co. vs. Heck.*—*Ill. Supreme Court.*

*Sands vs. N. Y. Life Ins. Co.*—*N. Y. Court of Appeals.*

*Cohen vs. N. Y. Mut. Life Ins. Co.*—*N. Y. Court of Appeals.*

*Swick vs. Home Life Ins. Co.*—*U. S. Circuit Court, Mo.*

*Hough, Clendenin & Co. vs. People's F. Ins. Co.*—*Court of Appeals, Md.*

*Commercial Ins. Co. vs. Robinson.*—*Ill. Supreme Court.*

*Rockford Ins. Co. vs. Nelson.*—*Ill. Supreme Court.*

*Merchants' Ins. Co. vs. Morrison.*—*Ill. Supreme Court.*

*Hoffman vs. Banks.*—*Ind. Supreme Court.*

*Franklin Ins. Co. vs. Chicago Ice Co.*—*Md. Court of Appeals.*

—H. C. Robinson, Esq., of Hartford, counsel for the defendant in the case of *Ripley et al. vs. Railway Passengers' Assurance Company*, recently decided in the United States Supreme Court, will accept our thanks for a copy of his brief in the case.

—A law passed by the legislature of Minnesota, and approved March 8th, 1873, requires American insurance companies not organized in the State to file a written agreement, signed by the president and secretary, agreeing that service of process in any civil action against the company may be made on the local agent of the company. Foreign companies are required to stipulate that service in their cases may be served

upon the Insurance Commissioner of the State. If their agent is absent or avoids service, it may be had by publication, posting, or by service upon the State Commissioner.

The following is a list of the Life Companies that have reinsured and retired from business. We think two or three companies have been omitted, but are unable now to name them. Of the thirty-nine companies given, three, the Hope, Excelsior, and National Capital, have retired during the present year :

Reinsured Co.	Reinsuring Co.
American Tontine, N. York.	Empire Mutual.
Amicable Mutual, New York.	Guardian, N. Y.
Anchor, Jersey City.	St. Louis Mutual.
Atlas Mutual, St. Louis.	St. Louis Mutual.
Baltimore, Baltimore.	
Ben. Franklin, New York.	
Cincinnati Mut., Cincinnati.	Union Central.
California Mut., San Fran.	Rep. Life, Chicago.
Craftsmen's, New York.	Hope Mut., N. Y.
De Soto, St. Louis.	Rep. Life, Chicago.
Empire Mutual, New York.	Continental, N. Y.
Empire State, New York.	Life Association.
Equality, Richmond, Va.	Failed.
Eagle, Chicago.	
Excelsior, New York.	Nat. Life, U. S. A.
Farmers and Mechanics, New York.	
Great Western, New York.	At suit Att'y Gen.
Great Western, Chicago.	
Hahnemann, Cleveland.	Rep. Life, Chicago.
Hope, New York.	New Jersey Mut.
Home, Cincinnati.	Missouri Mutual.
International, Chicago.	Univ'l Life, N. Y.
International, Jersey City.	United States Life.
Kentucky, Covington, Ky.	
Mut. Protection, New York.	Reserve Mut. N. Y.
Miss. Valley, Louisville.	St. Louis Mutual.
New York State, Syracuse.	Guardian, N. Y.
National Capital, Washington.	Penn. Mut., Phila.
Ohio Life and Trust, Cin'ti.	
Policy-Holders Life, Charleston, S. C.	Life Association.
Provident Life, Chicago.	
Reserve Mutual, New York.	Guardian Mutual.
Safety Deposit, Chicago.	Mutual, Chicago.
Standard Life, New York.	Guardian Mutual.
Tontine, Charleston, S. C.	Life Association.
United Security, Philadel.	
United States, Lafayette, Ind.	
Western, Cincinnati.	
Widows & Orphans, New York.	Reserve Mutual.

—The *London Review* says of Butler's proposed distribution of the Geneva award: "That the distribution should be the occasion of jobbery, we can only expect, and that a sharp scrutiny should be brought to bear upon the claims of shipowners and merchants, who throughout the contention have been well instructed in the art of inflation, is sufficiently necessary; but that the insurers, who by their courage saved many a firm from ruin and bankruptcy, should be excluded from their share in the award, is, we do not hesitate to say, simply dishonest. We are almost tired of repeating that insurance is an indemnity, and that the underwriter is entitled to all the rights of the assured, and this knowledge is a most material element in the assessment of premiums. Thus, an underwriter takes the risk of loss upon valuable and indestructible products, such as metals, at a lower rate, for the very reason that in the event of casualty or loss they can be more easily recovered, and what would be thought of the law that deprived him of the salvage that might result? Yet this is precisely the recommendation above quoted. Again, to take a larger view, who would have imagined that so acute a people as the Americans would have thus discredited the prudence from which the practice of insurance springs, or have inaugurated a precedent for increasing the burdens of the very body to whom they are under the greatest obligations? This would indeed seem to us to be incredible, were not the whole course of legislation in the United States especially framed for the destruction of their own maritime interests. We trust, however, that their representatives will alter at least so much of the report of the judiciary committee as shall make the distribution at least consistent with the principles of honesty."

—Gov. Geary of Pennsylvania had an insurance of \$10,000 upon his life.

—We understand that the Life Association of America have originated a new plan of equalization, a notice of which has been sent to the State Departments, but has not yet been given to the policy-holders of the company. The new managers propose to annul and recall all past dividends and make a new deal. We do not understand just how the policy-holders are to be benefited, but doubtless it is some new and original money-saving device.

—Mr. McAlpine, the well-known engineer, states "that the tonnage necessary for a vessel is in exact proportion of tons to the miles she has to go." This curious fact he has deduced from numerous replies to inquiries made by owners of vessels interested in lake and ocean navigation.

—The Judiciary Committee of the House of Representatives have agreed to report a bill which increases the salary of the Chief Justice of the United States Supreme Court to \$10,500, and the salaries of the Associate Justices to \$10,000.

—The story is told of Ben Butler's earlier days, that a Yankee obtained his legal opinion how to recover the value of a ham which a neighbor's dog came along and ate. He was advised to prosecute and recover for damages. "But the dog was your'n," said the sharp Yankee. Butler opened his eyes a little, asked him what the ham was worth, was told five dollars, paid the money, and then demanded a ten-dollar fee of the astonished native for legal advice.

—A Mill Plain farmer never grows tired of extolling the cheek of a life insurance agent, who solicited him last summer. He says, "there isn't hair enough in a mattress to make the fellow a pair of whiskers."

—The Western wits now call bigamy Utah-lizing the female sex.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

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*From certified transcripts in our possession.*

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AGENT.

§ 81. FIRE.—*Knowledge of—Collusion and Fraud—Application.*  
—It was claimed, on trial, that the building insured was represented in the application as a boarding-house, when it was in fact a public hotel; that the insured knew the agent was prohibited by the company from receiving applications to insure such buildings, and that there was collusion and fraud between the agent and the insured in making the application. *Held*, that if the things claimed were true, "then the knowledge of the facts by the agent could not affect the company, unless known to and assented to by them. The knowledge of the agent, in such a case, would not be considered the knowledge of the company, because if so engaged in defrauding his principal, he would not

be presumed to have communicated the information to appellants."

*The Rockford Ins. Co. vs. Nelson.*\*

Rep'd Jour'l p. 341.

ILL. S. C.

#### APPLICATION.

§ 82. *LIFE.—Answers in—Warranty.*—In the application, which was referred to in the policy, and made part of the policy, the assured covenanted that "the preceding answers given to the annexed questions, and the accompanying statements, and this declaration, shall be the basis and form part of the contract, or policy, which may be granted on the application; that the same are warranted to be full, correct, true, and that no circumstance is concealed, withheld, or unmentioned in relation to the past or present state of the health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life." It was also further agreed in the application "that if the foregoing answers and statements be not in all respects full, true and correct, the said policy shall be void." *Held*, that the statements and answers to the questions in the application were warranties. *Held*, also, that "a distinction is to be taken, we think, between untruthful answers to specific questions and the mere failure to make *full* answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospects of life, while an untruthful or incorrect answer to the specific questions asked, renders the policy absolutely void, though made in relation to a matter not material to the risk."

*Swick vs. The Home Life Ins. Co.*†

Rep'd Jour'l, p. 415.

U. S. C. C., E. DIST. MO.

§ 83. *FIRE.—Knowledge of Agent—Instructions of Agent—Representation.*—The application, made out by the agent of the com-

\* Decision rendered February 7th, 1873.

† Decision rendered March 25th, 1873.

pany, represented the building insured to be a boarding-house, and also contained representations in regard to the title and situation of the property. It was claimed on the trial that the building was in fact a public hotel, and that the other representations in the application were false. *Held*, that "if the agent of the appellant made out the application for insurance with a knowledge of the facts, and there was no collusion in doing so between him and appellee, the appellant is bound by its statements as to title, the situation of the property in reference to other buildings, as well as the statement as to the purposes for which it was occupied and used." *Held*, also, that "it has been repeatedly held that where insurance agents have secret instructions, as they are believed to have generally, a violation of such instructions does not affect the assured, unless he has notice of them, and the assured is not bound by the general instructions of the agent, unless they are brought home to the assured by notice."

*Ætna Ins. Co. vs. Maguire*, 51 Ill., 342; *N. E. F. and M. Ins. Co. vs. Schettler*, 38 Ill., 166.

*The Rockford Ins. Co. vs. Nelson*.

—481.

#### ASSIGNEE.

§ 84. *LIFE.—Insurable Interest of—Wager Policies.*—The company issued a policy to the assured upon his own life. The assured, with the consent of the company, assigned the policy to the plaintiff, and soon after died. The plaintiff brought suit against the company upon the policy as assignee. *Held*, that the plaintiff had no greater or better claim under the policy than the heirs of the assured would have had, and if they could not have recovered on account of fraud, misrepresentation or breach of its conditions, the plaintiff cannot recover. *Held*, also, that if the policy was assigned to the plaintiff as security for a debt due him from the assured, and for any sums he might afterwards advance, the plaintiff can recover on the policy, and can recover the full amount of the policy, although the debt of the assured to him may be much less than the amount of the insurance. *Held*, also, that a life policy is not valid if taken for the benefit of a person who has no insurable interest in the risk. The law



forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded, and that if the plaintiff and the assured confederated together to procure the policy for the benefit of the plaintiff, who was not and had not agreed to become a creditor, and with a view of having the same assigned to him thereafter without consideration, such fraudulent contrivance made the policy void.

*Swick vs. The Home Life Ins. Co.*

—§ 82.

### CONSTRUCTION.

§ 85. FIRE.—*Principles of—Ownership—Insurable Interest.*—In a suit upon a policy the plaintiff averred that she was the owner of the property insured. *Held*, that she was only bound to prove that she held and owned an insurable interest. *Held*, also, that the averment “amounts to an averment that the assured had an insurable interest, and not that he was the absolute owner of the property. When he sues, his right to recover depends upon whether he was the owner of an insurable interest, and not whether he was the absolute owner.” “Language not having a technical meaning must be construed with reference to the subject to which it applied.”

*The Rockford Ins. Co. vs. Nelson.*

—§ 81.

§ 86. FIRE.—“*W. D.*”—*Representation—Title.*—In the application the answer to the question whether the title was a warranty-deed or a bond, was “*W. D.*” *Held*, that the insured did not, by the answer, represent herself as holding any particular kind of title, and even if her answer means that her title was a warranty-deed, that is not an assertion that such a title is a fee.

*The Rockford Ins. Co. vs. Nelson.*

—§ 81.

§ 87. LIFE.—*Questions in Application—Intoxicating Liquors.*—In the application, which was referred to in the policy, and made part of the policy, the assured covenanted that his an-

swers in the application should be the basis of the policy ; that the same were warranted to be full, correct and true, and that if his statements made in the application were untrue or deceptive in any respect, the policy should be void. The application contained the following questions. The answers were given by the assured : " 6. Is your health good, and, so far as you know, free from any symptoms of disease? Answer—Yes." " 9. Are your habits uniformly and strictly sober and temperate? Answer—Yes." " 10. (A.) Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulants, or opium? Answer—No." " 10. (B.) Do you use habitually intoxicating drinks as a beverage? Answer—No." *Held*, that those questions will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning, and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world. *Held*, also that " the occasional use of intoxicating liquors could not make these answers untrue."

*Swick vs. The Home Life Ins. Co.*

—§ 82.

### INSURABLE INTEREST.

§ 88. FIRE.—*Ownership—Married Woman.*—The husband abandoned the wife, the insured, and when he left, made her a verbal gift of the homestead, upon which she and the family remained, and upon which she erected the building insured, with her own earnings, which by the statute she was entitled to, in her own right. *Held*, that she had such an ownership as gave her an insurable interest in the property.

*The Rockford Ins. Co. vs. Nelson.*

—§ 81.

§ 89. FIRE.—*Construction—Goods "Held in Trust"*—*Double Policies—Contribution.*—Two policies were issued to the plaintiffs, upon cotton stored in a certain warehouse, loss, if any, payable to the Warehouse Company, who had made large advances to them upon cotton stored in the same warehouse, and

upon which the company had a lien for such advances, and for storage. The Warehouse Company also held at the time of the fire two policies upon merchandise in the same warehouse, one of which insured them on merchandise "held by them, or in trust," and the other on merchandise "their own, held by them in trust, or in which they have an interest or liability." In the policies held by the plaintiffs, and in those held by the Warehouse Company, were stipulations that in case of loss the insured should not recover any greater proportion of the loss or damage sustained by the subject insured than the amount thereby insured should bear to the whole amount insured. *Held*, that "the law seems to be well settled that a person having goods in his possession as consignee, or on commission, may insure them in his own name, and in event of loss, recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner."

Story on Agency, § 111; *Ætna Ins. Co. vs. Jackson & Co.*, 16 B. Munroe, 258; *De Forrest vs. Fulton Ins. Co.*, 1 Hall, 126; *Lee vs. Adsit*, 37 N. Y., 90; *Waters vs. Assur. Co.*, 85 E. C. L. Rep., 879; *London and Northwest R. W. Co. vs. Glyn*, 102 E. C. L. Rep., 660; *North British Ins. Co. vs. Moffitt*, Law Rep. for Jan., 1872, p. 31; *Siter et al. vs. Morris*, 13 Penn. State Rep., 219.

*Held*, also, that the policies issued to the Warehouse Company cover not only their property, but all held in trust by them, or in which they had an interest, and that "by goods 'held in trust' are meant goods with which the assured is intrusted, 'not goods held in trust in the strict technical sense—so held that there was only an equitable obligation in the assured, enforceable by a *subpoena* in chancery—but goods with which they were intrusted in the ordinary sense of the word.' "

*Waters vs. Assur. Co.*, 85 Eng. C. L. Rep., 879.

*Held*, also, that the plaintiffs' cotton was insured by the policies issued to the Warehouse Company, and that the company can recover not only to the extent of their interest, but to the extent of their loss, unless the right of recovery to that extent is limited by some provisions in the policies. *Held*, also, that the lien for advances and storage constituted an insurable interest in the cotton, and that the plaintiffs' policies, "having on their

face been made payable to the Warehouse Company, they insured to the benefit of that company, and may be considered as in favor of the same assured, on the same interest, in the same subject, and against the same risks as the policies which were issued directly to the Warehouse Company," and are what are termed double policies,

*Sloat vs. Royal Ins. Co.*, 49 Penn. State Rep., 18,

"and that the insurance companies issuing them are bound to contribute their respective proportions of the loss."

*Merrick vs. Germania Fire Ins. Co.*, 54 Penn. State Rep., 282; *Flanders on Fire Insurance*, 40; *Ætna Fire Ins. Co. vs. Tyler*, 16 Wend., 396, 400; *Baltimore Fire Ins. Co. vs. Loney*, 20 Md., 38.

*Hough, Clendening & Co. vs. The People's Fire Ins. Co.\**

Rep'd Jour'l p. 353.

MD. C. A.

## LEGISLATION.

§ 90. *LIFE.—And Existing Law.*—An act of the Legislature, regulating foreign insurance companies, passed in 1865, contained provisions entirely different from those relating to such companies contained in an act of 1852, restricting foreign corporations. *Held*, that the act of 1865 was intended by the Legislature as a substitute for the act of 1852.

*Hoffman vs. Banks.†*

Rep'd Jour'l p. 348.

IND. S. C.

## LOSS.

§ 91. *FIRE.—Insurer's Liability—Damage and Total Loss—Burden of Proof.*—Two policies were issued to the appellants, upon cotton stored in a certain warehouse. The warehouse was destroyed by fire, and it was proved that the cotton insured was either among cotton destroyed, or among that which was damaged; but the proof left room for doubt as to whether it was included in the one class or the other. *Held*, that "it was incumbent upon the appellants, in order to recover for a total

\* Decision rendered June 20th, 1872. To appear in 36 Md.

† Decision rendered January 22nd, 1873.

loss, to show that the cotton insured was wholly destroyed, and having failed to show this, it must be assumed that it was only partially damaged."

*Hough, Glendening & Co. vs. The People's Fire Ins. Co.*

—180.

### PLEADING.

§ 92. FIRE.—*Averment of Conditions Precedent—Variance—Application and Policy.*—In declaring upon the policy, precedent conditions were not set out in one of the counts. *Held*, that "there was such a variance as should have excluded the policy as evidence under the count, or the instruction to disregard it under that count should have been given." "The policy with the conditions annexed constitute an entire contract, and in declaring upon the contract, it, or a sufficient portion of it to show a right of recovery, must be set out, either in terms or in substance." *Held*, also, that where the insurance is only payable on the performance of certain acts by the assured, all such precedent acts should be set out and their performance averred, but all conditions subsequent to the right of recovery, and all acts to be done by the company in discharge of their liability, may be omitted and left to be set up as a defense.

*The Rockford Ins. Co. vs. Nelson.*

—181.

### POLICY.

§ 93. FIRE.—*Copy furnished—Pleading—Estoppel.*—The original copy was burned, and the company, on being requested, furnished the instrument sued on, which was without seal, as a copy. It was objected, on trial, that the suit should have been in covenant and not in assumpsit, as the policy was under seal. *Held*, that parties may waive their rights and estop themselves from urging such objections, and that the company, having furnished the instrument sued on as a copy, was estopped from denying that it was a true and correct copy, and from being heard to say that the policy was under seal.

*The Rockford Ins. Co. vs. Nelson.*

—181.

§ 94. FIRE.—*Construction—Parol Evidence.*—The defendant issued a policy to the plaintiffs upon cotton stored in a certain warehouse. The warehouse and the property of the plaintiffs was destroyed by fire. The company owning the warehouse held at the time of the fire two policies on merchandise in the warehouse, their own, or held by them in trust, or in which they had an interest. On trial in the court below the plaintiffs offered to prove by the president of the Warehouse Company that at the time the company applied for their insurance, he informed the agents of the insurance companies that he wished the insurance to protect his company from loss and damage on cotton or merchandise in the warehouse, in which the company had an interest, and which was not covered by policies taken out by those who had deposited the same. *Held*, that “when a contract is reduced to writing, and is couched in plain and unambiguous language, courts must look to it alone to find the intention and meaning of the parties, and parol proof is inadmissible.”

Balt. Fire Ins. Co. vs. Loney, 20 Md., 36; Henderson vs. Mayhew, 2 Gill., 409.

*Hough, Clendening & Co. vs. The People's Fire Ins. Co.*

—§ 95.

§ 95. FIRE.—*Construction—Parol Evidence.*—The defendant issued policies to the appellants, at different times, on several lots of cotton stored in a certain warehouse. On trial, in the court below, one of appellants' witnesses had testified that it was the appellants' habit to take out policies on each additional lot of cotton as it came in. He was asked to explain whether it was the habit of the appellants to effect insurance on each specific lot of cotton, or on an additional number of bales, equal to the lot deposited. *Held*, that “the evidence sought to be elicited by this question was intended to show what was the intention and purpose of the appellants in taking the insurance, and the effect of the policies taken out by them.” “This could only be shown by the terms of the policies which were issued. They constituted the contracts between the parties, and being free from ambiguity, parol evidence was not admissible to explain them.”

*Hough, Clendening & Co. vs. The People's Fire Ins. Co.*

—§ 96.

§ 96. FIRE.—*Construction—Explosion.*—The policy provided that the company should not be liable “for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power \* \* \* nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind.” *Held*, that “equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company.”

Aurora Fire Ins. Co. vs. Eddy, 49 Ill., 106.

*Held*, also, that the last clause of the provision “refers to loss by explosions simply, without reference to fire,” and that “it secures exemption from liability for losses caused by explosions, but not from liability for losses by fire caused by explosion.”

Commercial Ins. Co. vs. Robinson.\*

Rep'd Jour'l p. 380.

ILL. S. C.

## PRACTICE.

§ 97. FIRE.—*Instructions to Jury—Evidence.*—In a suit upon two policies of insurance on cotton deposited in a warehouse, there was evidence to show damage to the cotton covered by the policies. *Held*, that it was error in the court below to instruct the jury there was no proof upon which they could allow damages for any injury by fire to the cotton insured by either of the policies sued on.

Hough, Clendenning & Co. vs. The People's Fire. Ins. Co.

—4 89.

§ 98. FIRE.—*Instructions.*—Upon trial in the court below, the appellant asked forty-six instructions, many of them being repetitions many times stated. *Held*, that “it is not error for the court to refuse to repeat instructions already given, although there may be a slight change in the phraseology.”

The Rockford Ins. Co. vs. Nelson.

—4 81.

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\* Decision rendered February 7th, 1873.

## PREMIUM.

§ 99. *LIFE.—War and Non-payment of—Confederate Notes—War and Agent.*—The defendant, an insurance company incorporated in New York, issued in January, 1850, a policy of insurance upon his life, to the plaintiff's husband, a resident of Mobile, Alabama. All the premiums upon the policy were paid, the premium due in January, 1862, being paid in Confederate treasury notes to the agent of the company at Mobile, who was appointed before the civil war, and through whom the policy was issued. *Held*, that "the war suspended this contract, and no forfeiture for non-payment would arise while the war lasted, provided the premiums with proper interest were promptly paid on the return of peace." *Held*, also, that the agent of the company at Mobile was the lawful agent of the company during the war, and had power to receive the premiums.

*Buckner vs. Curry*, 19 J. R., 137 ; *Denniston vs. Imbrie*, 3 Wash. C. C., 396 ; *Ward vs. Smith*, 7 Wall., 447 ; *Conn. vs. Penn.*, 1 Pet. C. C., 524 ; *United States vs. Grossmayer*, 9 Wall., 72 ; *Robinson vs. Inter'l L. Assur. Society*, 42 N. Y., 54 ; *Kershaw vs. Kelsey*, 100 Mass., 561.

*Held*, also, that the payment in Confederate notes was a valid payment.

*Robinson vs. Inter'l L. Assur. Society*, 42 N. Y., 54 ; *Polglass vs. Oliver*, 2 Crompt. and Jer., 14.

*Sands vs. The New York Life Ins. Co.\**

*Rep'd Jour'l* p. 372.

N. Y. C. A.

## PREMIUM NOTE.

§ 100. *LIFE.—Contract and Violation of Law—Statute.*—In April, 1870, the appellant gave his promissory note, payable five months after date, to the agent of a life insurance company as payment for the first premium on a policy of insurance upon his life. The policy was delivered to him in May of the same year, and in it the receipt of the premium was acknowledged. The statute

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\* Decision rendered January 21st, 1873. To appear in 50 N. Y.



of the State provided that it should not be lawful for the agent of any insurance company, incorporated by any other State, directly or indirectly, to take risks or transact any business of insurance in that State, without first producing a certificate of authority from the auditor of State. The act prescribed what things should be done to authorize the auditor to issue his certificate, among which was the filing of a statement of its condition by the company. It also made a violation of the law punishable by fine or imprisonment, or both. The company did not file the statement until July, 1870, and the certificate of authority to do business in the county was not issued to the company until the December following. *Held*, that the party seeking to enforce the contract is not the one the Legislature proposed to protect, and that the note was not valid, and that a new trial should have been granted.

*The Rising Sun Ins. Co. vs. Slaughter*, 20 Ind., 520; *N. E. F. and M. Ins. Co. vs. Robinson*, 25 Ind., 536.

*Hoffman vs. Banks*.

—490.

## WAR.

§ 101. *LIFE.—Effect of War on Contract.*—The defendant, an insurance company incorporated in New York, issued in January, 1850, a policy of insurance upon his life, for the term of his natural life, to the plaintiff's husband, a resident of Mobile, Alabama. All the premiums upon the policy were paid, the premium due in January, 1862, being paid to the agent of the company at Mobile. The insured died at Mobile in July, 1862. *Held*, that it is not law "that a valid debt by note, bond or contract, existing when the war began, against a citizen of a Confederate State, in favor of a citizen of a Northern State, was nullified by the war. The debt is suspended until peace returns. It is not destroyed."

*Buchanan vs. Curry*, 19 J. R., 137; *Bell vs. Chapman*, 10 J. R., 182; *Clarke vs. Morey*, 10 J. R., 68; *Ex-parte Boussmaker*, 13 Vesey, 71; *Semmes vs. City Fire Ins. Co., of Hartford*, 13 Wall, 158, [1 *Ins. Law Jour'l*, 663; "Prize Cases," 2 Black., 687; *The Protector*, 9 Wall, 687; *United States vs. Wiley*, 11 Wall, 508.

*Held*, also, that "contracts for the insurance of the enemy's property, of affreightment, and of commercial co-partnership, are avoided thereafter by the breaking out of the war, because they are inconsistent with the war—inconsistent with the interests and policy of government, whose purpose is, by the war, to destroy and cripple the enemy's property and commerce."

*Furtado vs. Rogers*, 3 Bos. and Pul., 191; *Kellner vs. Le Mesinir*, 4 East, 395; *Kershaw vs. Kelsey*, 100 Mass., 561.

*Held*, also, that the rule that makes such contracts of insurance of the enemy's property, of affreightment and commercial co-partnership void, has no application to life insurance. This contemplates no commercial intercourse, no aid to the enemy's commerce, and no aid or comfort to the enemy in violation of governmental policy. *Held*, also, that this contract was not avoided by the war.

*Buchanan vs. Curry*, 19 J. R., 137; *N. Y. Life Ins. Co. vs. Clopton*, 7 Bush., 179; *Hamilton vs. Mut. Life Ins. Co.*, Blatch, 234, [1 Ins. Law Jour'l, 573;] *Manhattan Life Ins. Co. vs. Warwick*, 20 Gratt., 626, [1 Ins. Law Jour'l, 115.]

*Sands vs. The New York Life Ins. Co.*

—499.

## WARRANTY.

§ 102. LIFE.—*False Statements in Application—Burden of Proof.*—In the application, which was referred to in the policy, and made part of the policy, the assured covenanted that his answers in the application should be the basis of the policy; that the same were warranted to be full, correct and true, and that if his statements made in the application were untrue or deceptive in any respect, the policy should be void. In answer to questions in the application, the assured stated that his health was good, and that so far as he knew, he was free from any symptoms of disease; that his habits were uniformly and strictly sober and temperate; that he had never been addicted to the excessive or intemperate use of any alcoholic stimulants, and that he did not habitually use intoxicating drinks as a beverage. *Held*, that the statements in the application were warranties, and if untrue, the

policy was void, although the statements were not material, and although there was no intentional or fraudulent misstatements, and although the party's health and habits, as to intoxicating drinks, did not in fact cause, hasten or contribute to his death. *Held*, also, that where a party relies on the breach of such a warranty, he must establish it by evidence. This is not the rule as to promissory warranties—that is, where the party warrants that he will not thereafter do or refrain from doing something stipulated in the policy as to the future. In this case the alleged breach of warranty is as to the statement of existing facts—the facts as to his health and the facts as to his habits—and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was *no* breach.

*Swick vs. The Home Life Ins. Co.*

—4 82.

# REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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UNITED STATES CIRCUIT COURT,  
EASTERN DISTRICT OF MISSOURI

MARCH TERM, 1873.

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FRANK SWICK, *Plaintiff*,

vs.

THE HOME LIFE INSURANCE CO.,  
*Defendant.\**

The defendant issued a policy to the assured, upon his own life, who, with the consent of the company, assigned the policy to the plaintiff. The assured died soon after and the plaintiff brought suit as assignee.

The plaintiff has no greater or better claim against the company, under the policy, than the heirs of the assured would have had; and if they could not have recovered, on account of fraud, misrepresentation, or breach of its conditions, the plaintiff cannot recover.

If the policy was assigned to the plaintiff as security for a debt due him from the assured and for any sums he might afterwards advance, the plaintiff can recover on the policy and can recover the full amount of the policy, although the debt of the assured to him may be much less than the amount of the insurance.

A life policy is not valid if taken for the benefit of a person who has no insurable interest in the risk. The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded, and if the plaintiff and assured confederated together to procure the policy for the benefit of the plaintiff, who was not, and had not

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\* Decision rendered March 26, 1873.

agreed to become a creditor, and with a view of having the sum assigned to him, thereafter without consideration, such fraudulent contrivance made the policy void.

In answer to questions in the application, the assured stated that he was in good health, and, so far as he knew, free from any symptoms of disease; that his habits were uniformly and strictly sober and temperate; that he had never been addicted to the excessive or intemperate use of any alcoholic stimulants, and that he did not habitually use intoxicating drinks as a beverage.

In the policy and in the application, which was made part of the policy, the assured agreed that his answers in the application should be the basis of the policy; that the same were warranted to be full, correct and true, and that no circumstance was concealed, withheld, or unmentioned in relation to the past or present state of his health, habits of life, or condition, which would render an insurance on his life more than usually hazardous, or might affect unfavorably his prospects of life; and that if his statements made in his application were untrue, or deceptive in any respect, the policy should be void.

The statements made by the assured in the application were warranties, and if untrue, the plaintiff cannot recover, although the statements were not material, and although there was no intentional or fraudulent misstatement, and although the party's health and habits as to intoxicating drinks did not, in fact, cause, hasten, or contribute to his death.

The questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning.

The occasional use of intoxicating liquors by the assured would not make these answers untrue.

A distinction is to be made between untruthful answers to specific questions and the mere failure to make full answers, which failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospect of life.

Where a party relies on the breach of such warranties, he must establish it by evidence. This is not the rule as to *promissory* warranties. In this case the alleged breach of warranty relates to existing facts, and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove there has been no breach.

JOHN W. NOBLE, AND STRONGS & HEDENBERG, for Plaintiff.

DANIEL T. POTTER, AND LEE & ADAMS, for Defendant.

DILLON AND TREAT, JJ.

*Gentlemen of the Jury:* The defendant issued a policy dated February 11th, 1870, to William Henry, for \$2,000.00, insuring his life. With the consent of the company, the assured, William Henry, by instrument dated March 19th, 1870, assigned the policy to the plaintiff. Henry died in June following. The plaintiff sues to recover from the company the amount of the policy. The defendant denies that the plaintiff is entitled to recover, and makes several specific defenses to the action, which the court will proceed to notice. Before doing so, in order that the views which the court may entertain in this case may come before you in a methodical way, we have taken

some pains to express them carefully, because of the great importance which attaches to all controversies of this kind, and on many points of which the law remains yet to be fully settled. The defendant, however, asks us to give you certain instructions, some of which we have given, and some of which are refused. Those which are given will be read to you.

First. That the plaintiff, Swick, has no greater or better claim against the defendant under the policy than the heirs of Henry would have had, and that if they could not have recovered on account of fraud, misrepresentation or breach of conditions, the plaintiff, Swick, cannot recover.

Second. That the statements made by Henry in the application, upon which the policy was issued, as to his health and freedom from disease, and as to his habits in regard to temperance and the use of alcoholic stimulants and intoxicating drinks, were warranties, and if untrue, that the plaintiff cannot recover, no matter whether these statements were material and increased the risk, or not, and no matter whether his last sickness or death resulted from or had any connection with his previous condition of health or not.

Third. That if the statements, declarations and agreements made by Henry in the application, upon which the policy was issued, as to his health and freedom from disease, and as to his habits in regard to the use of alcoholic stimulants and intoxicating drinks were untrue or deceptive in any respect, the plaintiff cannot recover.

The first relates to the assignment of the policy and the plaintiff's rights under such assignment. The plaintiff claims that prior to and at the time of the application for the policy, and at the date of the policy, he was a creditor of Henry, and remained such creditor until this time, and that the policy was assigned to him as security for the debt, and for any sums he might afterwards advance to Henry. If you find upon the evidence this to be the case, then the plaintiff can recover on such policy if Henry's executor could have recovered thereon, if the policy had not been assigned. And in such case the plaintiff can recover, if entitled to recover at all, the full amount of the policy, although the debt of Henry to him may be much less than the amount insured. On this subject we may observe that no life policy is valid if taken for the benefit of a person who has no insurable interest in the risk. Hence if this policy on the life of Henry had been taken directly for the benefit of Swick, and Swick at the time was not a creditor of Henry, and there was no agreement or understanding that it was for the purpose of securing him for advances to

be made to Henry, then the policy would have been void. The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded.

Hence if Swick and Henry confederated together to procure this policy for the benefit of Swick, who was not or had not agreed to become a creditor of Henry, and with the view of having the same assigned thereafter to Swick, without consideration, or not as a security for a debt due or to become due, then such fraudulent contrivance made the policy void. If, on the other hand, Swick was a creditor of Henry, and if the purpose in procuring the policy was to have the same assigned thereafter to Swick for his (Swick's) indemnity, and Swick paid the premium, and the facts were known to the agent of the company, the policy is not void. So if there was, as plaintiff contends, an understanding between Henry and Swick, the latter being a creditor of Swick, or having agreed to become such, that this policy should be taken on Henry's life, with the view of having Henry or Henry's estate in the event of his death in a condition to meet his debt to Swick, and that Swick paid the premium with the knowledge of the company's agent, and thereafter the policy was assigned to Swick when such creditor of Henry, or as a security for debts due or agreed to be created, and the company agreed in writing to such assignment, then the policy and assignment were not invalid. In other words, the law exacts fair dealings in these respects from all parties in interest. It will not uphold a policy made, or fraudulently contrived to be made for the benefit of a person who has no insurable interest in the risk. Mere speculative risks in the lives of others, or gambling policies of the kind, are forbidden for the good of society. It is not necessary for the purposes of this case to discuss what may, under different circumstances, be a mere speculative risk, or what interest will be non-speculative; for in the case before the jury the question is merely on the one hypothesis, whether Swick was a creditor of Henry at the date of the policy, and continued so to be at the date of the assignment; and on the other hypothesis presented—that if he had no understanding at the date of the policy concerning its subsequent assignment—whether Swick was Henry's creditor when it was assigned.

The main defense upon the trial has been rested upon alleged misrepresentations by the assured in the application, respecting his health, and his habits as to the use of alcoholic drinks.

In the application the following questions were asked of Henry and

answered by him: 6. "Is your health good, (and, as far as you know,) free from any symptoms of disease?" Answer—"Yes." 9. "Are your habits uniformly and strictly sober and temperate?" Answer—"Yea." 10. (a.) "Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium?" Answer—"No." 10. (b.) "Do you use habitually intoxicating drinks as a beverage?" Answer—"No."

By the terms of the contract between these parties, these answers are warranted to be true, and it is agreed in the policy that if these answers are untrue or deceptive in any respect, the policy shall be void and of no effect. The parties have the right thus to agree, and are bound by their agreement, and hence the importance of understanding what the questions asked were, and the answers given thereto. This is the more important, because if the answers given are untrue, the policy is avoided, although there are no intentional or fraudulent misstatements, and although the party's habits as to intoxicating drinks did not in fact cause or even accelerate his death. We remark to you first that the questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning, and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good, there is no mystery in the question.

If you find from the evidence that at the date of the application Henry's health was not good, or if Henry knew of any symptom of disease which he did not disclose, then there can be no recovery on the policy. If you find the fact to be as the company contends it was, that Henry's general health was at the time impaired by exposure, or from the use of intoxicating liquors, or from any other cause, there can be no recovery on the policy. But if it was known to the company, or its agent taking the risk, that the assured had, as certified by the family physician to the company, been sick a few days before, and if this was a mere temporary illness, which was over at the time, and was disregarded by the company, or its agent taking the risk, as not being within the purview of the question asked of the assured in this respect, the policy would not be thereby avoided.

Now as to the question respecting intoxicating liquors. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants. This is not a statement that he had never been addicted



to the use of intoxicating liquors at all, but a statement that he had never been addicted to the excessive and intemperate use of them, and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants.

The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers you will perceive relate to the habits of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant, would not make these answers untrue ; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to a habitual use of such drinks as a beverage.

It is your province to decide from the evidence whether the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage; and if you find his answer to either question to be untrue, there can be no recovery on this policy, although, as above remarked, he did not intentionally make false answers, and although those habits did not in fact cause, hasten, or contribute to the death.

We have been asked by the defendant to instruct you that if the answers as to the health and habits are not *full*, correct and true, the plaintiff cannot recover, even though the failure to make full answers was unintentional.

The application referred to and made part of the policy, contains the provision : "The undersigned does hereby covenant \* \* \* that the preceding answers and this declaration shall be the basis of the policy ; that the same are *warranted* to be full, correct and true, and that no circumstance is concealed, withheld, or unmentioned in relation to the past or present state of health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life," and that if the foregoing answers and statements be not in all respects full, true and correct, the policy shall be void. The policy repeats or adopts this provision. Now a distinction is to be taken, we think, between untruthful an-

swers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospects of life ; while an untruthful, or incorrect answer to the specific questions asked, renders the policy absolutely void, though made in relation to a matter not material to the risk.

The statements and declarations in the application are warranties, and the defense here is that there has been a breach of some of those warranties. Where a party relies on the breach of such a warranty, he must establish it by evidence. This is not the rule as to *promissory* warranties—that is, where the party warrants that he will not thereafter do or refrain from doing something stipulated in a policy as to the future.

In this case the alleged breach of warranty is as to the statement of existing facts—the facts as to his health, and the facts as to his habits ; and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was no breach.

These observations cover, it seems to us, all that it is necessary to state relating to the law of the case. The *facts* the law commits to your decision, to be decided upon the evidence, and upon the evidence alone, and it expects that your verdict will be one not influenced by any consideration arising from the nature of the parties—that it will be one which is the pure expression of your unbiased judgment upon the testimony adduced before you.

## SUPREME COURT OF MISSOURI,

MARCH TERM, 1873.

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*Appeal from St. Louis Circuit Court.*

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MACKLOT THOMPSON, *Respondent*,

vs.

THE ST. LOUIS MUTUAL LIFE INS. CO., *Appellant*.<sup>\*</sup>

The defendant issued a policy upon the life of the assured, whereby, in consideration of \$230.28, and an annual premium for the same amount, to be paid on or before the 28th day of March in each year for nine years, it agreed to pay the sum of \$3,000.00 at the expiration of the nine years, or if the assured should die in the meantime, in ninety days after due notice and proof of death.

The policy provided that if there should be a default in the payment of any of the annual premiums when due, such default should not work a forfeiture of the policy, but that the insurance should be commuted to such proportional part of the whole sum as the sum of the payments made should bear to the amount of the ten annual payments. The policy also provided that if the assured should fail to pay annually in advance the interest on any unpaid notes or loans on account of the annual premiums, the policy should be void.

At the foot of the paper upon which the policy was printed, was the following printed memorandum: "N. B.—Agents of the company are not authorized to grant permits, or to make, alter or discharge contracts, or waive forfeitures. If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments." There was a verdict for the plaintiff in the court below for the full amount of the insurance.

The assured died before the expiration of the nine years. The evidence showed that the premium due on the 28th of March, 1870, was not paid or tendered on that day, but that in two days thereafter it was duly tendered and refused; that at the time the tender was made there had been no change in the health or condition of the assured; that previous annual premiums upon the policy, commencing in March, 1868, had always been paid by the plaintiff weeks after they became due, and were received by the company without objection, and that it had been the practice of the plaintiff to pay the premiums upon another policy in the company, in force during the same time as this policy, long after they became due.

In contracts of insurance, as in other contracts, the parties may make the time of the performance of any stipulation of the very essence of the contract. In

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<sup>\*</sup> Decision rendered April 21st, 1873.

such case the contract becomes utterly at an end, or void as soon the default is made.

By their acts and conduct the parties have construed this contract for themselves, and the stipulation in regard to the time of the payment of the premiums was not regarded by them as of the essence of the contract.

The memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if it is to be considered as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the assured to disregard the exact day of payment and to rely upon the courtesy of the company.

It seems to be well settled that the practice of the company in accepting the payment of premiums without objection after the day stipulated for the payment, must be treated as a waiver of the exact time as an essential ingredient of the contract. Judgment affirmed.

CLINE, JAMISON & DAY, *for Appellant.*

GARESCHÉ & MEAD, *for Respondent.*

ADAMS, J.

This was an action on a policy of insurance issued by defendant to Alfred C. Bernoudy, whereby, in consideration of \$230.28 paid by him, and an annual premium of the same amount to be paid on or before the 28th day of March in each and every year next after the date of the policy, for nine years, the company assured the life of said Bernoudy in the sum of \$3,000.00, to be paid to the plaintiff at the expiration of the nine years, or if Bernoudy died in the meantime, to be paid in ninety days after due notice and proof of his death.

The policy provided that if default should be made in the payment of any of the annual premiums at the time limited for their respective payments, such default should not work forfeiture of the policy, but the \$3,000.00 insurance should then be commuted or reduced to such proportional part of the whole sum as the sum of the annual payments that had been paid should bear to the ten annual payments stipulated to be paid by Bernoudy.

And it was also provided that if the insured should fail to pay annually in advance the interest on any unpaid notes or loans which might be owing by him to the company, on account of any of the annual premiums, then, and in any such case, the company should not be liable for the payment of the amount of insurance, or any part thereof, and the policy should cease and determine.

Bernoudy, whose life was insured, died before the expiration of nine years, and the plaintiff under the policy claimed the whole amount of insurance. The defendant claimed a commutation of the

amount of insurance upon the alleged ground that default had been made in the payment of the annual premiums on the days stipulated. and the defendant also set up the additional defense of a forfeiture of the policy by reason of the non-payment in advance of interest on premium notes. At the foot of the paper upon which the policy was printed and written, but not embodied in the policy itself, there appeared to be the following printed memorandum: "N. B.—Agents of this company are not authorized to grant permits, or to make, alter, or discharge contracts or waive forfeitures. If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments."

The evidence in the case showed that the premium due on the 28th of March, 1870, was not paid or tendered on that day, but in two days thereafter the same was duly tendered and refused. The proof showed that in regard to the previous annual payments, commencing in March, 1868, they had always been paid weeks after they were due, and received by the defendant without objection. In regard to the premium of the previous year, it was paid six weeks after it became due, and received without any objection, and that there had been no change in the health or condition of the deceased. It also appeared that the plaintiff had another policy in this company which was running and in force during the same time as the policy sued on, and that in regard to the premiums accruing under this policy, it was the practice of plaintiff to pay and the defendant to receive the premiums long after they were due.

The court, at the instance of the plaintiff and against the objections of the defendant, instructed the jury as follows:

"If the jury believe from the evidence that it had not been the practice of the defendant to exact prompt payment of premiums when due under the policy sued on; that they had allowed said payments to lie over for several days or weeks after they became due and then accepted payment of said premiums, then these are facts from which the jury may find that the defendant waived a literal compliance with condition as to punctual payment; and if the jury further find that there was such a waiver, and that in a few days after the 28th of March, 1870, the plaintiff duly tendered to defendant the amount due under the policy, they will find for the plaintiff in the sum of \$3,000, less the amount shown to be due and unpaid on said policy, with interest on amount so due at the rate of six per cent. per

annum from the commencement of this suit, to wit, the 13th September, 1870."

There were instructions given and refused for defendant, but it is unnecessary to recite them, as the giving of the plaintiff's instructions raises the only material point in the case.

The jury, under this instruction, found for the plaintiff for the amount of the policy, less the amount unpaid on said policy, as indicated in plaintiff's instruction.

A motion for a new trial was overruled and judgment rendered at Special Term for plaintiff, and the defendant appealed to the General Term, where the Special Term was affirmed and an appeal taken to this court.

In contracts of insurance, as in other contracts, the parties may make the time of the performance of any stipulation of the very essence of the contract. In such case the contract becomes utterly at an end or void as soon as the default is made. The stipulation in regard to the time of the payment of the premiums in this policy, I do not regard as of the essence of the contract. It was not so regarded by the parties themselves. By their acts and conduct the parties have construed this contract for themselves. It was not regarded by either party as of the essence of the policy that the premiums would be paid on the very day that they became due.

The memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if we may consider it as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the plaintiff to disregard the exact day of payment and to rely upon the courtesy of the company. The plaintiff pursued this course, and instead of making his payments on the very day when due, let them lie over for a short time, and still they were received without objection. The plaintiff was thus induced to believe that a failure of strict payment on the day would not prejudice his rights. The courts have become more liberal in their construction of this sort of stipulations in policies of insurance. Formerly it was held that when in a fire insurance policy it was required that additional insurance could not be taken without first obtaining the consent in writing of the company, to be indorsed upon the policy, it would be void if such consent was not in every case so indorsed. It was not sufficient to give notice of the additional insurance and rely upon the company's verbal consent thereto. The old rule required the consent to be in writing, and indorsed upon the policy; but it is understood to be the settled law of this State

that if notice be given to the company of the additional insurance and no objection is made, the company will be estopped from insisting on a forfeiture of the policy because their consent thereto was not indorsed as required by the literal stipulation therein.

So in regard to the payment of premiums, it seems to be well settled that the practice of the company in accepting the same without objection, after the day stipulated for the payment, must be treated as a waiver of the exact time as an essential ingredient of the contract. See *Buckbee vs. United States Ins. Co.*, 18 Barbour, 541; *Reese vs. Mutual Benefit Life Ins. Co.*, 26 Barbour, 556; *Helme vs. Philadelphia Life Ins. Co.*, 61 Penn. State, 107.

Under this view the judgment must be affirmed. The other judges concur.

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## COURT OF APPEALS OF NEW YORK.

*Appeal from General Term of Superior Court of City of New York.*

HENRIETTA YATES COHEN, *Appellant*,

vs.

THE NEW YORK MUTUAL LIFE INS. CO., *Respondent*.\*

The defendant, a company incorporated in the State of New York, insured the life of plaintiff's husband, a resident of Savannah, Georgia. The policy, issued in 1849, provided that if the annual premiums should not be paid on or before the 2nd day of April of each year, the policy should be void and all previous payments forfeited. The premiums were duly paid until April 2nd, 1862, when the plaintiff offered to pay the premium to a former agent of the company, at Savannah, who refused to receive it. No further premiums were paid until the close of the war. Upon the close of the war the plaintiff made tender of the unpaid premiums, but the company refused to receive them, declaring the policy forfeited and canceled.

The general rule that in a state of war the individuals composing the belligerent States exist, as to each other, in a state of utter occlusion, and that all intercourse between them is forbidden, and that private contracts between them are either suspended or void, extends only to commercial intercourse and to questions relating to the legality and effect of commercial dealings and transactions.

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\* Decision rendered January 21st, 1878. To appear in 80 N. Y.

The law would prohibit the making of a contract of insurance, during war, upon the life of an enemy. It also forbids the transmission of money for the premium from one of the States at war, to the other.

This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the conditions prescribed, to wit, the payment of the annual premium. It was a life policy.

The contract was not, as to all its stipulations, and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premium, while it was wholly executory on the part of the defendant. The contract was a contract in the sense that it was to be performed in the future, but it was not a contract of continuance.

In the case of a marine insurance, or a contract of affreightment, a war acts as a dissolution, and puts an end to them; but this rule will not apply to a life policy where large sums have been paid for premiums.

Neither the policy of the law nor the interests of the public require the enforcement, after the war has ceased, of the law of confiscation, incident to a state of war, solely for the benefit of one of the contracting parties.

There is no reason why a contract of life insurance should necessarily be terminated by the happening of war between the States of which the parties are respectively subjects, as unlawful and inconsistent with the state of war.

Had the insured died at any time before April, 1862, the contract would not have been regarded as dissolved, but as merely suspended by the existence of war, and a recovery could have been had at the close of the war.

Individual citizens are not identified with their government so as to expose them to the rule of law, that he who by his own conduct prevents the fulfillment of a contract, or renders its performance impossible, shall not take advantage of a non-performance on the other side, or excuse the non-performance upon his part.

An individual, by his covenant, may undertake as against his own acts and the acts of strangers, but not against the acts of God or his government, or of the obligee.

If performance is made absolutely unlawful, it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation, and that which will avoid a covenant will nullify a condition, and *vice versa*.

The effect of the war, without any fault on the part of the plaintiff, was to render the attempt to make the annual payments unlawful, and she was relieved from the consequences of failing to pay the premiums upon the days they became due, and no injustice is done the defendant by permitting her now to make the payments she could not lawfully make between 1861 and 1865.

An incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership.

The plaintiff has a right to maintain an action at this time, although there has been no loss, and therefore no cause of action upon the policy.

Appeal from a judgment of the General Term of the Superior Court of the City of New York, affirming an order of the Special Term of said court, sustaining a demurrer to plaintiff's complaint.

Plaintiff's complaint alleged that on April 2nd, 1849, defendant, who was doing business in New York city, entered into a contract to insure the life of plaintiff's husband, who resided in Savannah, Georgia, in consideration of an annual payment to be paid on the 2nd day of April in each year, until the death of the assured. It was agreed in the policy, between plaintiff and defendant, that in case the annu-



al payments should not be made at the date mentioned, then said policy should cease and determine, and all previous payments should be forfeited. Until the year 1862 the annual payments were made. April 2nd, 1862, plaintiff, on account of the civil war which then existed between the States, was unable to pay defendant the premium, she being a resident of Georgia and defendant being in New York. She was ready and willing to make the payment, and offered to pay the same to one H., of Savannah, a former agent of the defendant, who refused to receive it. Plaintiff was in like manner prevented from making the annual payments due in 1863 and 1864, although she was ready and willing to make them. When communication was established between Savannah and New York, plaintiff tendered payment of the premiums that had accrued during the war, but defendant refused to receive them, and declared the policy forfeited and canceled. Plaintiff declares herself ready and willing to pay any and all premiums which may be due, and prays that she may be allowed to do so, and that the policy may be declared valid, or that the premiums paid by her to the defendant, and the interest thereon from the time of payment, be returned to her, and also all dividends from the time they were declared. Defendant demurred on the ground that the court had no jurisdiction of the subject matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action.

J. H. DUKES, *for Appellant.*

H. E. DAVIS, *for Respondent.*

ALLEN, J.

A decision of this appeal has been delayed at the request of parties to other actions pending in this court, like in character in some respects to this, that before the questions involved should be decided their appeals might be heard.

The importance of the questions at issue induced the court to listen to the request, and this case was substantially re-argued with *Sands vs. The New York Life Insurance Co.*, in December last. The legal status of citizens of States at war, and the relation they mutually occupy, as well as the effect of a state of war upon contracts and obligations of the subjects of litigant States, and their right to contract or hold intercourse with each other, have recently been so frequently the subject of judicial discussion and decision in the State and Fed-

eral courts, that the leading principles by which the intercourse and dealing between enemies—that is, between the inhabitants of States and nations at war, are prohibited, or restricted and regulated, and the effect of war upon their mutual contracts and obligations are quite familiar. They have been so often repeated in different forms, although in substance and effect the same, that a review of them or a reference at much length to them would be out of place.

The general principles and doctrines as found in the treaties of nations upon public law, and deducible from the judgments of courts, are firmly established, and cannot be ignored or essentially modified by courts at this day. All that courts have to do is to apply the principles thus recognized and settled to cases as they are. It is said in general terms that in a state of war “the individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion,” and all intercourse between them is forbidden. Per Johnson, J., *The Rapid*, 8 Cranch, 155. This proposition has been repeated with approval in several later cases. Judge Nelson in the *Prize Cases*, 2 Black, 635, 687, adopting the language of approved writers on international law, says that one of the legal consequences resulting from a state of war is that “the people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, between them, unlawful; and all contracts existing at the commencement of the war, suspended, and all made during its existence, utterly void. The insurance of enemy’s property, the drawing of bills of exchange or purchase on the enemy’s country, the remission of bills or money to it, are illegal and void; all existing partnerships between citizens or subjects of the two countries are dissolved, and in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of the war itself. See also *Jecker vs. Montgomery*, 18 How., 110; *Hanger vs. Abbott*, 6 Wallace, 532; *The Osachita*, ib., 521; *Griswold vs. Waddington*, 16 Johns. R., 438. These propositions, general and far reaching as they are, were however made in cases relating to commercial intercourse, and involved the question as to the legality and effect of commercial dealings and transactions, and the general language used in legal effect extends only to intercourse and dealings of that character, although all other intercourse clearly within the mischief intended to be avoided would be within the principle, and therefore within the rule itself.

I do not understand that it has been authoritatively adjudged that all private contracts without exception, made between citizens or

subjects of States at war, are necessarily void, although the language of the courts has been sufficiently comprehensive to include the proposition in its largest extent. The subject is elaborately and ably considered in *Kershaw vs. Kelsey*, 100 Mass., 561 ; and the authorities, with the reason and extent of the rule under consideration, reviewed and discussed, and the result of the examination was that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between these countries.

This was regarded as including every act of voluntary submission to the enemy, or receiving his protection in any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, direct or indirect. The act of Congress of July 13, 1861, 12 U. S. Statutes at Large, 257, and the proclamation of the President pursuant to that statute, only prohibited commercial intercourse between the citizens of the States declared to be in insurrection and the citizens of the rest of the States.

For all the purposes of this action it may be assumed that the rule, thus restricted, would prohibit the making of a contract during a state of war, for the insurance of the life of an enemy.

This was rather assumed by the counsel for both parties upon the argument. It would certainly forbid the transmission of money for the premium from one of the States at war to the other, and it is said that the life of an alien enemy cannot be insured by his creditor, although the latter be a subject of the same country with the insurer. *Bunyon's Life Assurance*, 19. The authorities cited to sustain this proposition were all, however, cases of insurance upon merchandise. *Harman vs. Kingston*, 3 Camp., 150 ; *Potts vs. Bell*, 8 T. R. 548 ; *Flindt vs. Waters*, 15 East, 266.

The insurance upon the life of the husband of the plaintiff was a valid and lawful contract at the time it was made, in 1849, and was for the term of his natural life, in consideration of a sum paid at the date of the policy, and the further consideration of the annual payment of a like sum on or before the second day of April in every year. This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit, the payment of the annual premium.

It is expressly declared in the contract of insurance that if the annual payments should not be made, "that said policy should cease and determine," and "that all previous payments made thereon should be forfeited to the company." It was a life policy. *Hodsdon*

vs. Guardian Life Ins. Co., 97 Mass., 144 ; Reese vs. Mutual Benefit L. Ins. Co., 26 Barb., 556 ; N. Y. Life Ins. Co. vs. Clopton, 7 Bush. (Ky.) R., 179.

The contract was not as to all its stipulations, and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk incurred from year to year. The annual premium paid during the first years of a life policy is in excess of the actual risk, and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies on young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss—the result of advanced age—has been incurred. The contract was a continuing contract in the sense that it was to be performed in the future, but it was not a contract of continuance, in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and in this respect was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretense that a contract of the latter kind would be dissolved by war. The contract would remain, the remedy would be suspended. The act to be performed by the plaintiff was a single act to be performed at stated periods, and was not like the contract of partnership, and some other contracts which are continuous in their performance.

In the case of a marine insurance, or a contract of affreightment, a war might act as a dissolution, and put an end to them. The first is upon enemy's property, and an insurance is in support of their commerce, and entirely inconsistent with the allegiance due to the government of the underwriter. As to such a contract, the authorities say the insurance terminates absolutely and at once by the very act of war, and the parties are in the same condition as if no contract was made ; the one loses the premium and the other his security against loss. But the rule will hardly apply to a life policy when large sums have been paid for premiums.

There is nothing in the policy of the law or the interest of the public calling for an enforcement of the law of confiscation incident to a state of war after the war has ceased and the people of the two belli-

gerent nations have again become one, solely for the benefit of one of two contracting parties, by the forfeiture of the rights of the other. This would be simply a confiscation of property after war had ceased, at the instance and for the benefit of individuals. By the payment of the annual premium in April, 1861, the life was insured until April, 1862; the engagement of the defendant was then lawful, and was to the effect that the company would pay the plaintiff five thousand dollars upon the death of her husband within the year. A promissory note in that form, made upon a good consideration, would be obligatory, and if the death occurs within the year, although after war had intervened, the right of action would be suspended during the war, but revive with the return of peace.

There is no reason apparent why the promise to pay money upon the termination of a specified life should necessarily be terminated by the happening of war between the States of which the parties are respectively subjects, as unlawful and inconsistent with the state of war, merely because it is called an insurance upon life. The policy in this instance protects the insurers and makes void the policy if the insured enter any military or naval service, or dies in the known violation of the laws of the United States, so that the risk was not increased by the state of war, nor the ability of the enemy to fill up the ranks of its army and navy affected by the insurance upon the life of its citizens. Those insured would rather be deterred from taking up arms against the United States, lest their policies should be avoided. Had the insured died at any time before April, 1862, I think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war.

The contracts between the individuals of belligerent States are necessarily suspended during the war of these States, but are not annulled. *Phill. Int. Law*, 666; *Per Nelson, J., Prize Cases*, *supra*. Mr. Wheaton says commercial partnerships are dissolved by the mere force and act of war, though as to other contracts, it only suspends the remedy. *Wheat. Int. Law*, 8th ed., 403, § 317. This is upon the principle that the States, and not the individual, wage war. The question then remains whether the non-payment of the annual premiums during the years 1862, 1863, and 1864, involved a forfeiture of the policy and of all payments before then made. That such would be the effect of the non-performance of the condition, unless waived or legally excused, is not disputed, and unless the performance

was waived by the defendant, or is legally excused by the existence of the war, the plaintiff must fail in her action and submit to the loss resulting from the forfeiture. It must be borne in mind that the war was the act of the States, and that individual citizens are not identified with their government so as to expose them to the rule of law, that he who by his own conduct prevents the fulfillment of a contract, or renders its performance impossible, shall not take advantage of a non-performance on the other side, or excuse the non-performance upon his part. *Odlin vs. Ins. Co. of Pennsylvania*, 2 Wash. C. C. R., 312; *Francis vs. The Ocean Ins. Co.*, 6 Cow., 404, S. C. in Error, 2 W. R., 64. The condition of affairs which made the payment of the premiums by the plaintiff during the years named unlawful, and therefore impossible, was not created by the act or default of the plaintiff, but resulted from the acts of the governments of which the respective parties were subjects. There is a manifest distinction between mere impediments and difficulties in the way of the performance of a condition, and an impossibility created by law, or the act of the government. This is clearly recognized in *Wood vs. Edwards*, 19 J. R., 205; *People vs. Bartlett*, 3 Hill, 570. An individual by his covenant may undertake, as against his own acts and the acts of strangers, but not against the acts of God or his government, or of the obligee. See *Per Nelson*, Ch. J., *People vs. Bartlett*, *supra*. In *Wolfe vs. Homer*, 20 N. Y., 197, the performance of the undertaking became impossible by the act of God in the death of the party, and performance was held excused upon the ground that the parties must be deemed to have made this an exception by implication. So, too, a party is excused from the performance of his covenant when the performance is made unlawful by act of Parliament. If made absolutely unlawful it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation. *Brewster vs. Kitchin*, 1 Ld. Raymond, 317; *Lord Alvanley*, Ch. J., in *Touteng vs. Hubbard*, 3 B. and P., 291, says: "But when the policy of the State intervenes and prevents the performance of the contract, the party will be excused." That which will avoid a covenant will nullify a condition, and *vice versa*. *Platt on Cov.*, 569; *Doughty vs. Neal*, 1 Saund. R., 214, N. (2.) The policy of the law is to mitigate the severity of wars, and relieve citizens, so far as consistent with the interest of the government, from the hardships incident to it, and *a fortiori*, the stringent and severe rule invoked by the defendant, should not be applied in a doubtful case so as to produce extreme hardship, when, by adopting a milder and more equitable rule, each of the contracting parties will

secure equal and exact justice, and all their legal and equitable rights. The operation of the statute of limitations is held suspended during the war by reason of the inability to enforce the claim, and this is in harmony with the benign tendency of the age, the result of advanced civilization. *Hanger vs. Abbott*, 6 Wal., 532. Judge Clifford says: "Neither laches nor fraud can be imputed in such a case." At the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payments, but the effect of the war was to make the attempt unlawful without any fault on her part. The operation of a condition as express and absolute as in this case was held suspended during the war in *Semmes vs. Hartford Ins. Co.*, 13 Wal., 158.\* The condition there, as here, was by the act and agreement of the party, and yet, its performance being impossible, it was held to be inoperative, and the time for bringing the action extended, notwithstanding the agreement of the parties, by the mere act and effect of the war. It was held that the disability to sue imposed on the plaintiff by the war, relieved him from the consequences of failing to bring suit within the time specified in the policy. The same principle would relieve the present plaintiff from the consequences of failing to make the annual payments by the day. She was guilty of no laches, and why subject her to a forfeiture? No injustice is done the defendant in this case by permitting the plaintiff to make now the payments which she could not lawfully make between 1861 and 1865.

The interest will compensate for the non-payment at the time, and the defendant in legal contemplation will be precisely in the situation it would have been had the money been paid on the law day. *Manhattan Life Ins. Co. vs. Warwick*, 20 Grattan, 614;† and *N. Y. Life Ins. Co. vs. Clopton*, 7 Bush. (Ky.) Rep., 179; [*Hamilton, ex'r, vs. The Mut. Life Ins. Co. of New York*,]‡ recently decided, in the Circuit Court of the United States in the Southern District of New York, are precisely in point, and, if followed, decisive of this case.

The reasonings of the prevailing opinions in these cases abundantly sustain the judgments. The case comes before us on demurrer to the complaint, and if there are any equities or any facts or circumstances which would deprive the plaintiff of the rights to which the case made by the complaint entitled her, the defendant may set them up by answer.

It was also claimed that the defendant, being a mutual company,

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\* 1 Ins. Law Jour'l, 668.

† 1 Ins. Law Jour'l, 578.

‡ 1 Ins. Law Jour'l, 115.

of which all holders of policies were members, it was a partnership which was dissolved by the war. Trading and commercial partnerships, and perhaps all partnerships, are dissolved by war between the States of the several partners. But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting, and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer, and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff, as a member of the company, and one of the corporators, but this does not make the members partners as between themselves, or affect the express contract of the corporation. If it was a partnership, as claimed, and dissolved by the war, the plaintiff has not forfeited her share in the assets of the copartnership, but is entitled to an accounting as of the day of the dissolution, and to her due proportion of the property and assets. This would lead to a result not desired by the defendant.

The defendant also objects to the right of the plaintiff to maintain an action at this time, there having been no loss, and therefore no cause of action upon the policy. The allegations of the complaint are that the plaintiff has tendered the premiums due, and that the defendant refused them, and declared the said policy cancelled and forfeited. This is a peculiar case, and there are many reasons, unless there is some rigid rule forbidding the court to entertain jurisdiction, why it should determine the matters in controversy at this time. 1. There is an actual controversy existing, and the only parties to it are before the court. There is not the reason for declining jurisdiction that presented itself in some of the cases cited by the defendant, as in *Grove vs. Bastard*, 2 *Phi.*, (Eng. Cha'y, 22,) 619, that all the parties in interest could not be heard and their rights determined. 2. Present rights under the policy, and incident to it, are denied the plaintiff. Her policy having been declared forfeited and cancelled, she is excluded from the privileges and denied the rights which belong to her as a member of the company. She is entitled, unless the claim of the defendant is well grounded, at once and at all times, to the privileges of other policy-holders, and to be recognized as such. 3. The plaintiff is entitled, if the right to pay the premiums and continue the policy still ex-



ists, to pay the arrearages and stop the accruing of interest, and to make the future payments as they accrue and become due, without interest, and relieve herself as well of the risk and burden of retaining the money which of right belongs to the defendant. 4. The contract of insurance, where the policy is to be kept alive by periodical payments, is peculiar, and the duty to pay and the obligation to receive are mutual. It is somewhat different from a simple obligation to pay money, a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is as essential as evidence of the continuance of the contract as is the original policy. The policy-holder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. 5. It is fit and proper that both parties to the contract should know their rights. Especially is it important to the plaintiff and the insured, that if this policy is avoided they may seek insurance elsewhere, and if valid, that they may perform the conditions of the policy. In ordinary cases courts will not, in advance of any present duty, obligation or default, declare the rights and obligations of suitors; they will do it where peculiar circumstances render it necessary to the preservation of right. It was done in *Baylies vs. Payson*, 5 Allen, 473.

Courts of equity depart from the ordinary rules by which their jurisdiction is hedged in, in order to do equity between suitors, and whether a proper case is made for the exercise of the equitable powers of the court, necessarily depends upon the circumstances. See *Ball vs. Coggs*, Brown's Parl. R., 296; *Buxton vs. Lister*, 3 Atk., 383; 2 Story on Eq. Jur., § 826.

Had the parties made a case containing precisely the facts alleged in the complaint for submission under § 372 of the code, the court would not have hesitated to entertain jurisdiction and pass upon the merits of the controversy.

The court has jurisdiction, and the judgment must be reversed and judgment given for the plaintiff, with leave to defendant to answer.

## SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1872.

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*Appeal from Cook County Circuit Court.*

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THE HOME INS. CO., OF NEW YORK, *Appellant,*

vs.

JOHN HECK, *Appellee.\**

The plaintiff insured a quantity of cord-wood, which was piled upon the line of a railroad. The policy provided that the company might cancel the policy on notice and return of the unearned premium. The agent of the plaintiff, while fires were burning in the surrounding clearings and forests, notified the insured of the cancellation of the policy.

The court below refused to transfer the cause to the United States Court, on the affidavit of the defendant. *Held*, that as the petition and affidavit are not made a part of the record by bill of exceptions, this court must regard them.

The company had a right to cancel the policy, on giving notice and returning the unearned premium, although the wood was in greater danger of fire at the time than when it was insured. The insurer cannot however cancel the policy when the fire is approaching the property insured, or in the face of a threatened and approaching danger.

It was error to instruct the jury that if the agent of the company notified the plaintiff before the loss, of its intention to terminate and cancel the policy, the plaintiff could not recover. It was error to instruct the jury that if the agent believed that the wood was not being protected against the fires with that degree of care which a man of ordinary prudence and caution would use, and that in consequence of such want of care there was danger that the wood would be destroyed, he would be justified in cancelling the policy.

The insured had a contract with a railroad company, by which he was to deliver and pile wood on the line of the railroad, for which the company was to pay a stipulated price. The company had no control over the wood, but as it was needed, the agent of the company, without saying anything to the insured, took as much as he wished from the piles, measured it, sent a voucher for it to the general office, and it was paid for in from twenty to sixty days.

*Held*, that the wood was the property of the insured. Judgment for the plaintiff affirmed.

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\* Decision rendered February 7th, 1873.

BREESE, J.

This was an action of *assumpsit* in the Cook Circuit Court on a policy of insurance written by the Home Insurance Company, of New York, on the third day of October, 1871, on a quantity of cordwood, cut, corded and piled by the plaintiff on the line of the Pittsburgh, Cincinnati and St. Louis Railroad, in the State of Indiana. The defense was that the insurance company had notified the assured of a cancellation of the policy as authorized by the terms of the policy.

The cause was tried by a jury and resulted in a verdict for the plaintiff. A motion for a new trial having been overruled, there was judgment on the verdict. To reverse this judgment, the defendant appeals. The first point made by appellant is the refusal of the court to transfer the cause on the affidavit of the defendant to the United States Court in pursuance of the act of Congress of March 2nd, 1867. The petition and affidavit is not made a part of the record by bill of exceptions ; consequently this court cannot regard them. Appellant raises several questions upon the rulings of the court upon the instructions ; and first, appellant complains that the plaintiff's first instruction was erroneous, and should not have been given. That instruction was as follows :

"Whether defendant had the right to cancel the policy in suit, depends upon the condition, with reference to danger of fire, in which the wood was at the time defendant's agent, Russell, notified the witness, Lane, that he would cancel said policy. If at that time the wood was in greater danger of fire than it was on the third day of October, 1871, when the contract was made, then defendant had not the right to rescind the contract and cancel the policy ; but if it was in no greater danger of fire on Saturday than it was when the contract was made, then the defendant had the right to rescind. Whether it was or was not in greater danger at that time, is a question for the jury to determine. Although you should find that at the time defendant's agent, Russell, notified the witness, Lane, that he would cancel the policy, the wood was not then in greater danger from fire, still the defendant is not entitled to treat the policy as cancelled, unless the premium to be returned to plaintiff was actually tendered, that is, shown to plaintiff, or an agent authorized to receive it for him, unless the actual tender or showing of the money was distinctly waived by the plaintiff or such agent. And upon the question of tender, the burden is upon the defendant to establish that fact by evi-

dence preponderating in its favor, and if the evidence is equally balanced upon that point, you must find that the policy was not cancelled." It is of the first two clauses of this instruction appellants complain. They contend that the right to cancel the policy did not depend upon the condition in which the wood was at the time of the notice of cancellation.

Taking the two clauses together as the instruction, it asserts this principle of law: If the wood insured was in greater danger by fire when the offer to refund the premium was made than it was when the policy was issued, the company could not rescind. We think this is laying down the law too broadly, for, by the terms of the policy, the insurer had a right to rescind on notice and a return of the unearned premium. It cannot be claimed, however, that an insurer against fire can, when the fire is approaching the property insured, cancel the policy. This would be acting in bad faith, and would not be justified by the law of the contract. Insurance is a contract of indemnity, the basis of which is, or ought to be, good faith on both sides. Of what avail would it be to take a policy against fire to permit its cancellation when the fire is approaching?

Appellants also complain that the court refused to give the first, second and fourth instructions asked by them. The first is as follows:

"The jury are instructed that by the terms of the policy of insurance, the defendant had, at any time before the loss or danger of the property insured, the right to terminate its liability by giving notice thereof to the plaintiff, and by the re-payment of the premium. If, therefore, the jury believe from the evidence in the case that during the life of the policy, and before the loss had occurred, the defendant through its agent in good faith notified the plaintiff or its agent of its intention to terminate and cancel the policy, and returned, or offered to return the premium, then the verdict must be for the defendant."

The objection to this instruction is obvious. It makes the right of cancellation depend upon an intention entertained by the agent in good faith to cancel the policy. It leaves out of view threatening and immediate danger which may environ the insured property. As appellants' counsel remarks in another part of his brief: "No court would permit an insurance company to declare a policy upon a certain building cancelled when the adjoining building was in flames." The jury are required by this instruction—the second clause of it—to consider, not the circumstances surrounding the property insured, but only the good faith with which the agent may have given the notice of cancellation. The next instruction refused is as follows:

"The jury are instructed that if they believe from the evidence in the case that the wood in question was destroyed by fire coming from an entirely different direction, or from a different source from that from which danger was apprehended at the time notice was given of the termination of the policy, then the defendant had the right to terminate the policy by giving notice thereof to the plaintiff or his agent, and by refunding or offering to refund the premium paid." This instruction is coupled in the argument of appellants' counsel with the following :

"The law will not presume, and the jury, in the absence of any evidence in the case, will not be justified in presuming that an attempt to cancel the policy in question, and an offer to rescind the premium paid thereon was made in bad faith. If the jury believe from the evidence in this case that Mr. Russell, acting as the agent of the defendant on the 5th day of October, 1871, upon examining the wood described in the policy, and the manner in which it was being cared for, honestly came to the conclusion that it was not being protected against the fires then burning in the surrounding clearing and forests, with that degree of care which a man of ordinary prudence and caution would exhibit in the protection of his own property under similar circumstances, and that in consequence of such want of ordinary prudence and caution there was danger that said wood would be destroyed by said fires, then the jury are instructed that he would be justified for that reason in terminating the policy by giving notice of the fact to the plaintiff or his agent, and returning or offering to return the premium." In regard to the first of these instructions, if there was an impending fire from a quarter different from the one which first caused apprehension, the insurer would have no right to cancel the policy. It would be an act done in the face of a threatened and approaching danger, and which the insurers were not competent to do. Such a right would render policies of insurance valueless. The other instruction takes away from the jury all consideration of the facts existing at the time the fire was raging, and places the right to cancel the policy solely upon the honest belief of Russell that the wood was not properly cared for. It was well calculated to mislead the jury and to fix their attention upon the single fact of the honest purpose of Russell. We think the court properly refused these instructions.

Another point of importance is made by appellants, and that is as to the ownership of the property. Appellants contend it was the

property of the railroad company. If so, appellee has no right to recover of appellants. What are the facts?

The wood was cut by appellee on his own land, hauled to the line of the Pittsburgh, Cincinnati and St. Louis Railroad, corded and piled at Kokomo, a station on that road, and he testifies it was his wood when insured. William Jones testified that appellee employed him to watch the wood the day it was insured—watched it until it was burned. D. D. Rudolph, the fuel agent of this railroad, testifies he knows when Heck had a lot of wood; knows when it was burned; took account of and measured the place where the wood had been to ascertain how much had been burned; measured wood for Heck on the same ground three or four times before this wood was gotten out by Heck for the use of the railroad company; took out wood each month; there was other wood besides Heck's there, some of which was destroyed; the railroad company had 1,200 cords destroyed; verbal contract made with Heck in 1868; Heck was to deliver wood on the line of the railroad between Kokomo and Galveston; that was part of the contract, and witness was to pay so much for it; measured it when it was taken out; was to measure it and send voucher to the company; the wood when delivered was not under the control of the company; we could take it when we chose without saying a word to Heck; we did not exercise any control over it until we received it; the wood that was burned had been there a year; they were hauling all the time and we taking it away from any pile that suited us; it was not delivered until we received it; we received it when measured and marked; had never measured this wood; measured it after it was burnt, by order of the superintendent; we had the right to take any of the wood when piled, or all, if we wanted it; as soon as it was marked and piled we could take it and haul it off whenever we pleased; we had been taking and using the wood as we wanted it ever since Heck commenced delivering, in 1868; had a habit of putting on the wood the names of the men who delivered it, when we wanted it; when witness measured wood he made a voucher and sent it to the general office, and it was paid in twenty to sixty days' time; the delivery was made by Heck to the railroad company when wood was measured; we never paid for the wood that was burned.

We think this testimony most conclusively settles the question of ownership, and the trouble has arisen from a misuse of the word "delivered." It is very evident the wood was the property of appellee when cut and hauled and piled at Kokomo. As a mass it was his. It

was deposited, not delivered, on the line of the railroad for the convenience of the road—not delivered to them as their property, for there was no one present to accept it. It was delivered only in such quantities as the road wanted, and the quantity was measured to them from any pile the company or their agent might select. Will it be pretended that the railroad company could maintain trover for any one of these piles of wood, it not having been measured to them and received by them? No one will so insist. As unmeasured piles—as they were—they were the property of appellee. When a pile was broken in upon, and a quantity taken from it and measured to the company, that specific quantity belonged to the railroad company, and nothing more. Suppose after Heck had piled the wood the company did not choose to provide their fuel from any one of his piles? What then? Whose wood would it be under the contract testified by Rudolph, their fuel agent? Certainly not that of the company. Were the company under an engagement to take all the wood Heck deposited there, and they declined doing so, Heck's remedy would be on the contract, and he could recover damages for its breach, but the title to the wood would remain in Heck.

There is not in our judgment a particle of proof to establish title in these piles of wood covered by this policy in the railroad company.

In this connection appellants complain that instruction eleven asked by them was not given. The instruction is as follows :

"If the jury believe from the evidence in this case that before the issuance of the policy in question the plaintiff had entered into an agreement with the railroad company, by which he had agreed to sell to them a quantity of wood at a certain fixed price per cord, to be piled and delivered on the line of said railroad, between Kokomo and Galveston; that in pursuance of such agreement the wood in question was piled and corded on the line of said road, and delivered to said railroad company; that the said railroad company, by the terms of such agreement, had the right to take such wood at such times and in such quantities as it saw fit, and agreed to measure the same when taken, and within a certain stipulated time thereafter pay for the same, then the jury are instructed that the title to all said wood thus piled up and delivered on the line of said railroad, passed to said railroad company; that said company is liable to the plaintiff therefor, and the verdict in this case must be for the defendant."

This instruction might have been given without any prejudice to appellee's case had the court modified it by telling the jury what constituted a delivery, and that there was no evidence of a delivery of the

wood in cords or piles. But as directing the attention of the jury to the ownership of the wood, that had been done by appellants' fourth and fifth instructions—particularly the fifth, which is as follows :

"If the jury believe from the evidence in the case that before the 8th day of October, 1871, the wood in question had been actually sold by the plaintiff to the railroad company, and that plaintiff had ceased to have any interest in it, then the verdict must be for the defendant."

To decide this question under this instruction, the jury must have taken into their consideration all the elements contained in the eleventh instruction, which was refused. It is idle to pretend there was a sale and delivery of these different piles of wood to the railroad company.

They were always the property of appellee. Appellants took a risk on them at a high premium, and they ought to be held to a strict accountability. Every exertion was made by appellee to save his property from the flames, but unavailingly. Appellants must pay its insured value. Although appellee's first instruction is faulty, being too broad in its scope, yet the jury could not be misled by it, and the merits being so clearly with appellee, we would not reverse for this error.

Justice has been done, and the judgment must be affirmed.

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## UNITED STATES CIRCUIT COURT.

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*Western District of Michigan.*

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BENJAMIN LUCE, *Plaintiff,*

*vs.*

THE SPRINGFIELD FIRE AND MARINE INS. CO., *Defendant.\**

The defendant insured the plaintiff's assignor against loss or damage by fire, to the amount of \$2,500.00, on his oil paintings, consisting of landscapes and

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\* Decision rendered March, 1873. From *Chicago Legal News*.



portraits, as per schedule. In the printed portion of the policy was the following clause : " Said loss or damage to be estimated according to the true and cash value of the said property, at the time the same may happen." The schedule enumerated 105 paintings, and opposite the name of each was placed an amount, as \$1,000.00, \$3,000.00, etc., without further words or explanation.

After the loss, the general agent and adjuster of one of three other companies which had issued policies upon the same property, and who represented himself as acting for all the companies interested, entered into an agreement with the insured that the companies would pay *pro rata*, and that he should accept \$3,000.00, in full satisfaction of the four policies. The evidence showed that the agent was not authorized to bind the defendant.

An agreement of compromise must have been one which would operate as a satisfaction of the contract of insurance before such agreement can be offered as a defense to an action on the policies. It must bind both parties so that suit may be maintained by either to enforce the same.

A valued policy determines beforehand the amount for which the insurer is liable in case of loss, and the amount is inserted in the policy as a fixed sum to be paid if loss occurs. It does more than merely value the property insured : It values the loss.

If in the schedule, before the sign of dollars, in each instance some word as "worth," "valued at," "value," or "agreed value," had been inserted, indicating that the figures represented agreed values, this might be held to be a valued policy. The tendency of the cases is to hold that valuing the property values the loss and is in the right direction.

If the written part of a policy is inconsistent with the printed, the latter must give way ; but the rule is as well settled that the different clauses must be made to harmonize if possible. In this policy these parts are not inconsistent. This is not a valued policy. Judgment for plaintiff.

O. E. CORBITT AND L. D. NORRIS, *for Plaintiff.*

HUGHES, O'BRIEN & SMILEY, *for Defendant.*

WITHEY, J.

Luce brings this action as the assignee of a policy of insurance issued by the defendant to James H. Roberts, dated Feb. 28th, 1871, insuring Roberts "against loss or damage by fire, to the amount of twenty-five hundred dollars, for one year, on his oil paintings, consisting of landscapes and portraits, as per schedule—\$7,500.00 other insurance." In the printed portion of this policy is this clause : " Said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same may happen."

The schedule referred to in the policy was made up and furnished by the insured to defendants' agent some two or three days after the application for insurance, and subsequent to the date of the policy, enumerating one hundred and five paintings ; opposite each is extended in figures what purports to be Roberts's estimate of value. I say Roberts's estimate, because it is in proof that the figures indicate his valuation. The schedule reads :

"President Taylor and Cabinet, \$1,000.00.

"President Harrison and Cabinet, \$1,000.00.

"One full-length portrait of Washington, \$1,000.00.

"General Taylor and the battle of Buena Vista, \$3,000.00," etc., comprising one hundred and five paintings, the aggregate of the sums extended amounting to \$45,900.00. Three questions are presented :

1. Was there a compromise between Roberts, plaintiff's assignor, and defendant and the other companies that issued policies insuring the property ?
2. Was the policy issued by the defendant a valued policy ?
3. What is the measure of damages ?

Four companies issued policies covering the property in question, three of them insuring \$2,500.00 each, and one \$2,400.00, making \$9,900.00 insurance. Defendant's policy was for \$2,500.00, the "Phoenix," of Hartford, \$2,500.00, the "Home," of New York, \$2,500.00 and the "Queen," of Liverpool and London, \$2,400.00. Mr. Ireton, the general agent and adjuster of the "Phoenix," visited Grand Rapids, and under claim that he represented, for purposes of settlement, all the companies, obtained an understanding with the insured that the companies would pay *pro rata*, and the insured would accept three thousand dollars in full satisfaction of the four policies. All the paintings, save two, having been destroyed by fire, Roberts claimed nine thousand nine hundred dollars full insurance. Ireton claimed the paintings were worthless as works of art, and of trifling value. The evidence shows that Ireton had not authority to bind all the companies, consequently his promise that any company for which he was not authorized to act would give Roberts a draft for its proportion, was not binding on such company. From which it follows that as to all the policies, there was no binding compromise.

By the terms of the arrangement, Roberts was to receive drafts from the companies as soon as they could arrive from Detroit, where defendant and the "Queen" were represented by general agent and adjuster. The two drafts from Detroit were received within two or three days by the local agents at Grand Rapids, who offered them to Roberts if he would receipt and surrender the policies of those companies. A few days after this, Roberts transferred to plaintiff Luce all the policies remaining in his hands, and his rights in the surrendered "Phoenix" policy. No draft in behalf of the "Home" company was received by the local agents, nor was one drawn or tendered to Roberts in behalf of the "Home" until the trial of this cause.

Mr. Ireton, at the time of the arrangement of compromise, gave

Roberts a draft for \$757.58, on the "Phoenix" Co., being its proportion of the \$3,000.00 to be paid in compromise, and took up the policy of that company. The tender by defendant and the "Queen" was conditioned that Roberts surrender and receipt the policies. It would seem that such incomplete tender by two companies, and no seasonable tender by the "Home," would present another good reason why the compromise was not effected, if a tender and readiness to perform were necessary. But standing as a mere agreement of compromise, it must have been one which would operate as a satisfaction of the contracts of insurance, before such agreement can be offered as a defense to an action on the policies. A compromise agreement, like accord and satisfaction, in order to take away the right of action on the original contract, must be an agreement which is substituted for the pre-existing obligation. It must bind both parties so that suit may be maintained by either, to enforce the same. I think neither party was bound by the compromise arrangement, except so far as it was executed, as it undoubtedly was, with the "Phoenix" company.

The question of valued policy is not so free from difficulty. This policy runs very close to the dividing line between an open and a valued policy, but after much consideration, it is my opinion that this is not a valued policy. Such a policy determines beforehand the amount for which the insurer is liable in case of loss, and it is inserted in the policy as a fixed sum, to be paid if loss occurs. It does more than merely value the *property* insured, it values the *loss*. To do this the policy must amount to a contract, either to pay, in case of loss, a stipulated sum; or that the property shall be estimated at a stipulated sum in case of loss. Such seems, fairly stated, to be the rule of the books. *Flanders on F. Ins.*, 45; *Phil. on Ins.*, secs. 1178, 1180, 1218; *Harris vs. The Eagle F. Ins. Co.*, 5 J. R., 368; *Laurent vs. Chatham F. Ins. Co.*, 1 Hall R., 52, 53; *Wallace et al. vs. Ins. Co.*, 1 *Bennett F. Ins.*, 412.

An agreement between the insurer and insured that the property shall be estimated at a certain sum, would make a valued policy, and the question is, was that done in this case? It has been held, when the policy describes the property, and contains a clause "valued at," or "agreed value," or "worth," followed by a specific sum, that such words indicate a valued policy, because amounting to an agreement that in case of loss, the property shall be estimated of the value stated.

If the policy, after describing the property, had added only "value

\$10,000.00," or other sum, this might probably, by analogy with decided cases, be held a valued policy ; and yet, it would then seem not to be within the idea of a valued policy as defined in the books, but to value the property, not the loss ; between valuing the property and valuing the loss, the books have attempted to make distinction, and yet it verges upon a distinction without a difference, when we consider the cases cited to illustrate and support the rule ; and yet, in principle, there is a clear distinction, though not always exemplified by the adjudicated cases. The tendency of the cases is to hold that valuing the property values the loss, and is in the right direction.

But does this policy indicate such an agreement between the parties ? I read this policy as if, instead of the words "as per schedule," it ran thus, "Do insure James H. Roberts against loss or damage by fire, to the amount of \$2,500.00, for one year, on his oil paintings, consisting of landscapes and portraits, viz :

"President Taylor and Cabinet, \$1,000.00 ; President Harrison and Cabinet, \$1,000.00 ; one full-length portrait of Washington, \$1,000.00 ; General Taylor and the battle of Buena Vista, \$3,000.00," and so on, with the entire list of 105 paintings.

Now unless the court interpolates into this contract some word or words, not there, before the sign of dollars, in each instance, indicating that the figures represent agreed values, as "worth," "valued at," "value," or "agreed value," it is not clearly seen how the policy can be held, according to adjudicated cases, or upon principle, to be an agreement that in case of loss, such amounts shall be the estimated value of the paintings named. Especially is it difficult to so read the contract, when further on in the printed portion of the policy is the express stipulation that "the loss or damage is to be estimated according to the true and actual cash value of the property at the time the same may happen."

If the written part of the policy is inconsistent with the printed portion, the latter must give way to the former is a well-established rule in reference to policies of insurance, but I am unable to say that there is any inconsistency, and certainly the rule is as well settled that the different classes must be made to harmonize if possible. They are not inconsistent, but in harmony, when read together. Without further discussion, I hold, for the reasons stated, that this is not a valued policy.

The only question remaining is, as to the rule of damage. The plaintiff's only testimony on this subject is that given by Roberts, the insured, who says, in his judgment the paintings were worth forty-

five thousand dollars. Roberts is an old man, and has for thirty years been engaged in painting ; but when his testimony is weighed in the light of the evidence produced by the defendant, no one can justly conclude otherwise than that Roberts's judgment is not a safe criterion of the value of these paintings. The basis of his judgment was not stated, and I have little doubt no just basis for his extravagant valuation exists.

On the part of the defendant there were four persons testified, all of whom speak from knowledge of works of art, including paintings. One, for thirty years has been a successful portrait painter ; two have been and are extensive dealers in paintings and works of art, importing from Europe, and evincing a discriminating judgment of art works. They all testify that as works of art these paintings had no value. Their judgment was based upon, and they testified in reference to, the two paintings which were not destroyed—portraits of "John Wesley" and "Governor Bouck," which were by Roberts, the insured, declared to be of average merit with the paintings destroyed, as I have the testimony, though it is claimed he qualified this statement as to "Wesley." But take "Gov. Bouck" as a standard. The witnesses say these two paintings, which were produced in court, are worthless as works of art. Both paintings were thus characterized ; that of "Wesley" utterly worthless, and that of "Gov. Bouck" as very inferior ; it has "hardness of color or surface texture, wanting in drawing, wholly defective in composition, coloring, and everything. They do not come under the head of art."

It is said by these witnesses, that landscape paintings of like inferior quality would be worth more than portraits, because they would sell better at auction to persons without taste, or ignorant of art or of the value of paintings. They say landscapes of like want of merit might bring twenty-five to fifty dollars at auction. Portraits of "Governor Bouck" might bring twenty-five to thirty dollars, for the sake of having a copy of Elliot's original painting, but such portraits as "John Wesley," would be utterly worthless. Paintings find their market value mainly from their quality and the name of the artist. There are in this list of paintings, 88 portraits, 4 groups of portraits, 5 battle-pieces, 4 historical pieces, and 4 landscapes. Under the evidence, it is somewhat doubtful what the value of the destroyed paintings may be, but the proof will justify me in finding about \$3,000.00 as the value, particularly if aided by the fact that the defendant, with the "Home" and "Queen," come into court and tender at this rate ; while in my opinion, \$3,000.00 is the full value of the paintings in any

and every aspect of the case ; and I am not disposed, in view of all the facts, to fix the amount less.

Defendant is liable for \$757.58 of this value, and \$44.20 for nine months' interest. Judgment for plaintiff \$801.78, and costs.

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SUPREME COURT OF MINNESOTA,

JANUARY TERM, 1872.

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*Appeal from Court of Common Pleas for Ramsey County.*

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MARY SCHWARTZ, *Respondent,*

vs.

GERMANIA LIFE INS. CO., *Appellant.\** }

The plaintiff made a written application to the local agent of the defendant for insurance upon the life of her husband. The application stated that the present state of the husband's health was good, and that he had never been afflicted with serious illness, and in answer to a question, also stated that the plaintiff was aware that the contract of insurance became valid only by the payment of the first premium, and closed with a provision, among other things, that the policy should not be binding until the amount of premiums, as therein stated, should be received by the company or some authorized agent thereof, during the lifetime of the party insured.

The application was accepted by the company, and a policy forwarded to the agent. The policy provided that the first premium should be paid *in hand*, and the others annually, and further provided that it was accepted on the express condition that it should be of no effect if the premiums, or any part of them, were not paid on or before the several days thereinbefore mentioned for the payment thereof respectively, or within three days thereof. At the foot of the policy was a note as follows : " Agents holding an appointment from the company are authorized to receive premiums at or before the time when due, upon the receipt of the president or secretary of the company, but not to make, alter or discharge contracts or waive forfeitures."

The agent offered to deliver the policy to the husband upon payment of the premium, but he refused to receive it on the ground that the solicitor had agreed to take the premiums in board. Afterwards, at his request, this policy was returned to the company, and another policy, like the first in all respects, save

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\* Decision rendered April 3rd, 1873.

that it provided for semi-annual premiums, was forwarded to the agent, and received October 25th.

On the 13th of October the insured was seized with a dangerous illness, of which he died on the 29th of the same month. On the same day the policy was received by the agent, and after its reception the plaintiff called upon the agent, tendered the premium, and demanded the policy, which the agent refused to deliver on account of her husband's sickness.

There was evidence tending to show that the company's instructions to the agent were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of delivery. There was no evidence that these instructions were known to the plaintiff.

The application for insurance is a mere proposal on the part of the applicant. When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made. This acceptance must be signified by some act.

When the agent offered the first policy to the husband, who was acting for the plaintiff, upon the payment of the premium, the company thereby signified its acceptance of plaintiff's proposition.

The plaintiff's refusal was a refusal to comply with the terms of her own proposition. It was a repudiation of the proposition—a rejection of the proffered acceptance, and, in effect and fact, a refusal to receive the policy at all, and the plaintiff having repudiated her own proposition, the company stood where it would have stood if it had never accepted plaintiff's proposition, conditionally or otherwise.

If the agent had no authority, discretion, or duty, save only to deliver the policy upon payment of the first premium, then payment or tender of the premium would have entitled the plaintiff to the full benefit of the policy, the same as if it had been unconditionally delivered.

It was competent for the company to transmit its policy to its legal agent, with instructions, general or special, to deliver the same to plaintiff upon payment of the first premium, provided her husband was in good health at the time of such delivery. In such case the transmission of the policy to the agent would go no further than to signify the company's acceptance of the plaintiff's proposition, on condition that the husband was in good health.

As the question whether the instructions were given to the agent was a question of fact, the policies and the correspondence between the company and the agent were properly received in evidence as documentary evidence of the transactions between the parties.

The vice-president of the company, in answer to a question, stated that it was the custom of the company not to deliver or send policies to agents for delivery except upon condition that the person whose life was insured was in good health.

Held, that this evidence was properly excluded. Unless the custom was shown to be known to the plaintiff, or to have been communicated to the agent as instructions, it was immaterial.

The statements in the application as to the health and physical condition of the party had reference to the state of facts existing, or which had existed, at the date of the application, and not to any which might occur subsequently to that date.

It was not necessary for the plaintiff to bring the amount tendered into court, as the defendant could receive it as a deduction from any amount she might recover. Reversed and new trial granted.

BERRY, J.

The principal controversy in this case relates to the law applicable

to certain facts with regard to which there is very little difference between the parties.

The defendant is a life insurance company, having its home office in the city of New York, and a local agency in St. Paul, in charge of one Ferdinand Willins.

On the first day of September, 1870, the plaintiff made a written application to defendant, through said Willins, for insurance upon the life of Fridolin Schwartz, her husband. The application among other things contained statements that "the present state of health" of the party whose life was to be assured was good; that he was not afflicted with any bodily defect; that the state of his health had been good theretofore, and that he had never been afflicted with any serious illness, defect, or personal injury. It also contained the following question and answer, viz.:

"Are you aware that this contract of assurance becomes valid only by the payment of the first premium?" Answer—"Yes." The application closed as follows, viz.: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the days it becomes due, will render the policy null and void, and forfeit all payments made thereon; also that the policy of insurance hereby applied for shall not be binding upon this company until the amount of premium as stated herein shall be received by said company or some authorized agent thereof, during the lifetime of the party therein insured."

On said 1st day of September said Willins, by mail, transmitted to defendant's home office the application, enclosed in a letter of that date, the text of which is as follows: "Enclosed please find application of F. Schwartz, \$1,000.00."

On Sept. 9th Willins received from the home office a letter signed by defendant's president, dated Sept. 5th, acknowledging receipt of the application and letter from Willins, and enclosing a policy on the life of Fridolin Schwartz, bearing date on said Sept. 5th. This policy is in general in the usual form of policies of endowment assurance. It provides for the payment of annual premiums of \$62.88 each, the first to be paid *in hand*, the rest, respectively, to be paid on or before the fifth day of September in every year, during the continuance of the policy.



The policy provides further that it is accepted upon the express condition that it shall be of no effect, 1st, if the declaration—evidently referring to the application made by or for the assured—"forming part of the contract, and upon the faith of which this contract is made, shall be found in any respect untrue." 5th, "If the above premiums or any of them, shall not be paid on or before the several days hereinbefore mentioned for the payment thereof respectively." Willins offered to deliver this policy to Schwartz upon payment of the premium. Schwartz declined to pay the same in cash, claiming that one Rosenfield, a solicitor in the employ of Willins, had agreed to take the premium in whole or in part in board, which, however, such solicitor had no authority to do.

The policy was not delivered, but at the request of Schwartz was returned on Oct. 13th to the home office, with the request that it be changed for another policy providing for semi-annual instead of annual payments. On Oct. 25th Willins received a letter from the home office, acknowledging receipt of the returned policy and of his letter requesting the above-mentioned change to be made, and enclosing another policy like the first in all respects save that it provided for the payment of semi-annual premiums, \$32.07 *in hand*, and \$32.07 "to be paid on or before the fifth day of March and September in every year during the continuance of the policy."

At the foot of each policy was a note as follows, viz.: "Agents holding an appointment from the company are authorized to receive premiums at or before the time when due, upon the receipt of the president or secretary of the company, but not to make, alter or discharge contracts or waive forfeitures."

On Oct. 13th Fridolin Schwartz was attacked with a dangerous illness, of which he died on Oct. 29th.

On Oct. 25th, after the arrival of the second policy, plaintiff went to the office of Willins, inquired for the policy, and was informed that it had come. Upon asking if she could have it, she was told that she could not, because her "husband was taken sick."

Thereupon having requested that the premium money be taken, which was refused, on the ground that her "husband was sick," she tendered the premium money, but defendant's agent refused to receive it on the sole ground that her "husband was sick." The second policy was never delivered nor offered to be delivered to plaintiff or her husband, and about the first of November was returned to defendant's home office at defendant's request. On the 18th of March, 1871, proofs of the death of Fridolin Schwartz and of

plaintiff's claim under the policy were transmitted by Willins to the home office. There was testimony in the case, not contradicted, and tending to show that defendant's general instructions to Willins were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of such delivery. There is no evidence going to show that these instructions were known to the plaintiff.

Plaintiff's counsel takes the position that these facts make out an acceptance by defendant of a proposition by plaintiff, the effect being to conclude "a contract of insurance between the parties according to the terms proposed." What is said in *Heiman vs. The Phenix M. L. Ins. Co.*, 17 Minn.,\* would seem to be in point here. "The application for insurance is a *mere proposal* on the part of the applicant. When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made. This acceptance must be signified by some act."

Plaintiff's application is properly characterized as a proposition to defendant.

And when Willins (defendant's agent) offered the first policy to Schwartz, who appears to be regarded by common consent as acting for the plaintiff as well as for himself in the whole business, upon payment of the first premium, defendant thereby signified its acceptance of plaintiff's proposition. In other words, defendant thereby offered to insure the life of Fredolin Schwartz by delivering to plaintiff its policy of insurance upon prepayment of the first premium in hand. But this payment was refused. This was a refusal by plaintiff to comply with the terms of her own proposition.

It was a repudiation of the proposition, a rejection of the proffered acceptance, and in effect and in fact a refusal to receive the policy at all.

Plaintiff having thus repudiated her own proposition, and refused to comply with the conditions upon which defendant signified its acceptance of her proposition as the basis of a contract of insurance into which defendant offered to enter by delivering its policy, defendant, so far as any obligation or liability to plaintiff was concerned, stood precisely where it would have stood if it had never accepted plaintiff's proposition, conditionally or otherwise.

Under these circumstances defendant certainly had the right to insist that it was not bound to the plaintiff by any contract of insurance or by any agreement to enter into a contract of insurance.

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\* 1 Ins. Law Jour., 415.

After plaintiff had thus refused to receive the first policy, it was at plaintiff's instance returned to defendant's home office.

We are unable to conceive why under these circumstances it was not utterly imperative as a foundation for any rights whatever upon plaintiff's part, whether such rights are sought to be placed upon the ground that defendant had insured, or upon the ground that it had agreed to insure the life of her husband.

If we are right, it follows that if there was any contract concluded between the parties to this action, this result must have been effected by the second policy, and what took place in reference thereto.

The facts already stated show that plaintiff's request that the policy should provide for semi-annual instead of annual premiums was acceded to, and that accordingly a second policy, providing for such semi-annual premiums, was transmitted from defendant's home office to defendant's agent (Willins) at St. Paul.

Plaintiff's counsel claims that this second policy was not a "new contract;" that "the original contract was not superseded or rescinded by it," but only modified in relation to the manner of payment; that it "was really an affirmation of the original contract;" "that it was intended to be but a redraft of the first as modified by mutual consent."

However ingenious these suggestions may be, it is evident that they possess little or no force if the views which we have already expressed in regard to the first policy and its utter inoperativeness as a contract of any kind, or as evidencing a contract of any kind, are sound.

As we have no doubt of their soundness, we are forced to the opinion before expressed that if there was any contract concluded between the parties, this result must have been brought about by the second policy, and the facts which transpired in reference to it. The second policy was never delivered nor offered to be delivered to plaintiff, or to any one for her. Yet independent of this policy, there is nothing in the case tending to show any binding acceptance of plaintiff's proposition, or any agreement to insure or contract of insurance. If, then, defendant in any way signified its acceptance of plaintiff's proposition, so that a contract was concluded between the parties, it must have done it by transmitting the second policy to Willins, its agent, for the purpose of having the same delivered to plaintiff upon payment of the first premium in hand. And if Willins had no authority, discretion or duty in the premises, save only to deliver the policy upon payment of the first premium, then we can see no good reason why the transmission of the policy to him might not well be regarded

as a signifying by defendant of its acceptance of plaintiff's proposition, nor any good reason why payment or tender of the first premium to such agent, even if delivery of the policy was withheld, would not have been completely effectual to entitle the plaintiff to the full benefit of the policy to the same extent as if it had been manually and unconditionally delivered. There is however nothing whatever in this case showing, or tending to show, that the defendant was under any legal obligation to accept plaintiff's proposition, or to enter into any contract of insurance thereupon by issuing or delivering a policy, or otherwise. Plaintiff's application was a mere proposal, which defendant was at liberty to accept or decline at its own option. And as defendant was thus at liberty to accept or decline plaintiff's proposition at its own option, it is clear that upon the facts appearing in this case, defendant was at liberty to accept upon such terms and subject to such conditions as it saw fit to impose.

It was therefore competent for defendant to say to plaintiff, we will accept your application and deliver to you our policy upon payment of the first premium, provided your husband is now in good health; and it would be equally competent for defendant to transmit its policy to its legal agent, with instructions, general or special, to deliver the same to plaintiff upon payment of the first premium, provided her husband was in good health at the time of such delivery.

And in such case the transmission of the policy to the agent would go no further than to signify the defendant's acceptance of plaintiff's proposition on condition that her husband was in good health. The agent's refusal to deliver the policy because of the fact that the husband was not in good health, would not be an attempt on his part to alter the contract, or impose terms other than those which had been agreed upon, as plaintiff's counsel contends. No contract could be made nor any terms agreed upon without some action upon the part of defendant.

There being no action upon defendant's part except the transmission of the policy to its own agent, to be delivered upon payment of the premium, upon the condition above mentioned, there would be no contract made nor any terms agreed upon, save such as embraced such condition.

Nor is this a case in which where an agent performs an act within the apparent scope of his authority, the act binds his principal, notwithstanding it was done in violation of private or secret instructions. The case at bar is not one in which the agent has performed any act in the name of his principal under an apparent authority to perform

the same, so that the party with whom he has contracted has acquired rights which the principal will not be permitted to gainsay. But if the instructions under which Willins refused to deliver the policy were in fact given, the case is one in which the agent has refused to perform an act which would bind his principal, and by virtue of which, if performed, the plaintiff would acquire certain rights against such principal, and has refused to do this because instructed by his principal so to do.

Now if the plaintiff had acquired any right to the policy or to a contract of insurance, except such as was subject to the condition of her husband's good health, as we have endeavored to show that she had not, if the instructions referred to were in fact given, then she might well contend that she was not to be deprived of that right by any private instructions given by defendant to its agent. Not having acquired any such right—that is to say, if the instructions referred to were in fact given—she is not in a position to insist that the policy shall be delivered to her in disregard of such instructions, or that she shall have the same rights and benefits as if it had been delivered to her. As the general charge of the court to the jury was entirely at variance with the views above expressed, there must be a new trial.

This disposes of what has seemed to us to be the principal and most difficult question presented by this appeal, but as there may be a new trial, it is expedient that we should consider some of the other questions raised and discussed by counsel.

The question whether the instructions as to delivering policies, provided the person whose life was to be insured was in good health, were given, being a question of fact, the plaintiff had the right to put in her testimony upon the basis that no such instructions were given. And in this view we perceive no reason why the two policies, notwithstanding the signatures were cancelled, together with the correspondence in reference thereto between defendant and its agent, Willins, were not properly received in evidence as documentary history of the case, and of the transactions between the parties in reference to the subject of the action. We think the court was justified in receiving the evidence of what was said by Gustav Willins at the time when plaintiff went to the banking office occupied by him (Gustav) and his brother Ferdinand, since there was testimony tending to show that Ferdinand was present at the conversation, and also that Gustav was in the practice of assisting his brother in the insurance business, and of attending to the same in his brother's absence.

The 10th interrogatory addressed to Schroendler (defendant's vice-

president) inquired for the custom of the defendant as to delivering policies. The answer, which appears to be responsive to the interrogatory, states among other things a custom of the defendant not to deliver or send policies to agents for delivery except upon the condition that the person whose life is to be insured is in good health.

We think the interrogatory and answer were properly excluded. Unless this custom was shown to be known to plaintiff, or to have been communicated to Willins as instructions, it is impossible to see its materiality in this case.

In regard to the statements contained in the application, and mentioned in the early part of this opinion, as to the health, bodily defects, etc., of Fridolin Schwartz, we are of opinion that they had reference to the state of facts existing or which had existed at the date of the application, not to any which might occur subsequently to such date.

The points made by defendant in reference to the court's refusal to instruct the jury as requested upon the question of tender, do not appear to be particularly insisted upon.

It is unnecessary to say more in regard to them, than that we think the tender sufficiently pleaded in the complaint, that it was not necessary for plaintiff to bring the amount tendered into court, the case being one in which, if she is entitled to recover at all, defendant may receive the premium money in the way of a deduction from the sum of her recovery, and that as the evidence tended to show an absolute refusal to receive the tender, the manner in which the testimony tended to show that it was made, was beyond doubt sufficient.

We need not consider the propriety of the questions which were excluded by the court as not proper cross-examination.

This objection to them can easily be obviated if a new trial should be had.

Nor need we consider the point made as to the allowance of interest on the judgment.

An amendment allowable as a matter of course would present the recurrence of the question raised.

This in effect disposes, we think, of all the important matters presented by the case.

Order refusing a new trial reversed, and new trial granted.

## SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1872.

*In Error to the Circuit Court of the United States for the Districts of  
Missouri.*

B. FRANK PARTRIDGE, *Plaintiff in Error;*

vs.

THE PHOENIX MUTUAL LIFE INS. CO.\*

The plaintiff was employed as agent of the defendant, and having been discharged, claimed a right to a commission on the annual premiums thereafter paid or to be paid on policies issued through his agency.

The plaintiff introduced in evidence a letter from the defendant, written in reply to one asking information as to the precise relation which he bore to the company, and under which he had acted in taking the policies for which he claimed the additional commission. The letter among other things contained the following: "Concerning your status in Missouri, it is simply this: You are working up a business for yourself, and are paid the highest commission which we pay." For the purpose of explaining the meaning of this phrase, the plaintiff offered to prove by competent witnesses that it was the usage between insurance companies generally and their agents in St. Louis, where the business of this agency was conducted, to pay the commission claimed.

The language of the letter was neither ambiguous nor technical, and to have admitted the usage offered in evidence, would have been to make a contract for the parties, differing materially from the written one, under which they had both acted for some time.

The incorporation of local and limited usages and customs into an express contract, whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing. This is not consistent either with authority or the principles which govern the law of contracts.

A sum of money in the plaintiff's hands was admitted to be due the defendant, if plaintiff's claim was not established. No objection was made in the Circuit Court to pleading it as a set-off, and therefore none can be made here. Defendants in the Circuit Courts of the United States can avail themselves of the laws which prevail in the State Courts concerning the right of set-off generally. Judgment of the Circuit Court affirmed.

\* Decision rendered April 7th, 1873.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff in error was plaintiff in the Circuit Court, and his action was brought to recover for services rendered the defendant as agent in their business of life insurance. The plaintiff having been discharged from the employment of defendant, asserted a right to a commission on the renewal or annual premiums thereafter paid or to be paid on account of policies issued through his agency.

To establish this he undertook and offered to prove by competent witnesses that this was the usage between insurance companies generally and their agents in St. Louis, where the business of this agency was conducted.

The question did not arise whether this custom could have been proved as the measure of plaintiff's compensation, in the absence of any express contract, because he had introduced in evidence a letter from the defendant in reference to this compensation, under which he said he had acted in taking the policies for which he now claimed the additional commission.

This letter was written in reply to one asking information as to the precise relation which he bore to the company, and among other things it stated that : "Concerning your status in Missouri, it is simply this : You are working up a business for yourself, and are paid the highest commissions which we pay," and it was for the purpose of explaining the meaning of this phrase, or affixing to it a meaning which it did not bear on its face, that the testimony was offered in two or three different shapes.

The court rejected the testimony on the ground that the language was clear and needed no explanation to which usage could apply.

There was no question as to the amount, or percentage, or premium which was to be paid under this letter. The plaintiff stated that he had retained a certain percentage, which was that allowed by the company.

The testimony was not offered to show what was the highest commission paid by the company.

It appears to us, as it did to the Circuit Court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff.

The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage to discover its meaning.

To have admitted the usage offered in evidence in this case would



have been to make a contract for the parties differing materially from the written one, under which they had both acted for some time.

The tendency to establish local and limited usages and customs in the contracts of parties who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law.

When this is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to, or vary or contradict the well-expressed intention of the parties made in writing.

No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts.

A question is raised in this court not raised in the Circuit Court, as to the right of the defendant to recover, by way of set-off or cross-action against the plaintiff, a sum of money in his hands as agent of the plaintiff, which was admitted to be due if plaintiff's claim was not established.

The amount was admitted by plaintiff, and no objection was made to pleading it as a set-off. Therefore, none can be made here. But if the point were open to inquiry, it is settled by the case of *Ward vs. Aurora City*, 6 Wallace, 139, that defendants in the Circuit Courts of the United States can avail themselves of the laws which prevail in the State concerning the right of set-off generally.

It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held, and escape the liability which the laws of the State have attached to all plaintiffs, of allowing just and legal set-offs and counter-claims to be interposed and tried in the same suit and in the same form.

The judgment of the Circuit Court is affirmed.

## SUPREME COURT OF MISSOURI,

MARCH TERM, 1873.

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*Appeal from St. Louis Circuit Court.*

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HARRIET O. CHISHOLM, *Respondent*,

vs.

NATIONAL CAPITAL LIFE INS. CO., *Appellant*.\*

The company issued and delivered a policy to the plaintiff for \$5,000.00 upon the life of Clark, between whom and the plaintiff a contract of marriage was existing. The plaintiff was to pay the annual premiums and did pay the first premium, and the policy was made payable to her as the intended wife of Clark. While the policy was in force, and before the marriage had been solemnized Clark died.

An insurance upon life has but very little resemblance to a fire or marine insurance. In a fire or marine insurance the particular object is to indemnify against a pecuniary loss, and the event upon which the money is made payable is the happening of the loss, the terms of the contract being to pay whatever is lost, not exceeding a specific amount. But a life insurance is a valued policy, and is a contract to pay a certain definite sum on the happening of a particular event, which may or may not occasion a pecuniary loss.

There is no statute in this State covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy.

An uncertain interest in the life of the person insured is sufficient to support and uphold a policy in favor of another, for whose benefit it was taken.

The plaintiff had such an interest as was entirely sufficient to render the contract valid. Judgment affirmed.

ISAAC T. WISE, *for Respondent*.HENDERSHOTT & CHANDLER, *for Appellant*.

WAGNER, J.

The main error assigned and relied upon for the reversal of this case is the action of the court in refusing to declare that the plaintiff

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\* Decision rendered April 21st, 1873.

had no such insurable interest in the life of the person insured as would entitle her to recover.

The record shows that there was a contract of marriage existing between plaintiff and Robert Peel Clark, and that on the 17th day of July, 1869, the defendant made and delivered to plaintiff its policy of insurance, whereby it insured the life of the said Clark for the term of his natural life, for the sum of five thousand dollars. The policy was issued and delivered to plaintiff, and made payable to her as the intended wife of Clark, she paying the annual premium of ninety dollars and twenty cents. The first premium was duly paid by her, and on the 12th of January, 1870, whilst the policy was in full force, and before the contemplated marriage had been solemnized, Clark died.

What interest, or whether any is necessary in the life of the person insured, to support the contract of insurance, is left in some confusion by the adjudged cases, as the authorities are contradictory. The leading case, of *Godsall vs. Boldero*, 9 East, 72, was decided on the principle that a contract of life insurance was simply a contract of indemnity, not only requiring an interest in the assured, in order to give it validity at its inception, but continuing good only so far as it was rendered so by the permanence of such interest. But that case was generally received with great dissatisfaction, and the insurance officers seldom availed themselves of the decision, as they found it very injurious to their interests to do so. They usually paid the amount of their life insurances, and the decision was practically disregarded. But the same question was subsequently taken to the Exchequer Chamber on error in the case of *Dalby vs. The India and London Life Assurance Co.*, 15 Com. Bench, 364, and *Godsall vs. Boldero* was directly overruled. There it was held that the contract of life assurance was not one of indemnity, but a mere contract to pay a certain sum of money upon the death of a person in consideration of the due payment of a certain annual premium during his life. An insurance upon life has, in fact, but very little resemblance to a fire or marine insurance. In a fire or marine insurance the particular object is to indemnify against a pecuniary loss, and the event upon which the money is made payable is the happening of the loss, the terms of the contract being to pay whatever is lost, not exceeding a specified amount. But a life insurance is a valued policy and is a contract to pay a certain definite sum on the happening of a particular event, which may or may not occasion a pecuniary loss. In England there is a statute (4 Geo. III. ch. 48) which enacts, in express

terms, that no insurance shall be made on the life of any person wherein the person for whose use the policy shall be made shall have no interest, and that in all cases where the insured hath interest in the life, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life. But this statute does not extend to Ireland, and the courts of that country have held, in a number of cases, that at the common law policies of insurance are valid without any interest. Bunyon on Life Assurance, p. 11 ; Shannon vs. Nugent, 1 Hayes, 536 ; Ferguson vs. Lomax, 2 Dru. & War., 120 ; Scott vs. Roose, Long & Town, 54 ; Brit. Ins. Co. vs. Mager, Cook & A. C., 182.

In this State we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy.

In *McKee vs. The Phoenix Ins. Co.*, 28 Mo., 383, it was held that where the life of a husband was insured for the benefit of the wife, the policy was not necessarily determined by the wife's obtaining a divorce from the husband ; that she might still have an insurable interest in the life of the divorced husband that would support the policy. In *Lord vs. Dall*, 12 Mass., 118, the plaintiff was a young female, without property, and had been for several years supported and educated at the expense of her brother, who stood towards her in the attitude of parent. He effected a life policy for her benefit, and it was decided that she had an insurable interest in his life. Parker, C. J., who wrote the opinion of the court, said : " But it is said the interest must be a pecuniary legal interest to make the contract valid ; one that can be noticed and protected by the law ; such as the interest which a creditor has in the life of his debtor, a child in that of his parent, etc. The former case indeed of the creditor would leave no room for doubt. But with respect to a child for whose benefit a policy may be effected on the life of a parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father who depended on same fund, terminable by his death, to support the child, would never be questioned, although much more should be secured than the legal interest which the child had in the protection of

his father. Indeed, we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it easily be discerned why the underwriters should make this a question after a loss has taken place, where it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation." This case establishes the principle that an uncertain interest in the life of the person insured is sufficient to support and uphold a policy in favor of another for whose benefit it was taken. The brother supported and educated the sister, but he was under no legal obligations to do so, and he might have withdrawn that support at any time.

In a well-considered case (*The Trenton Mut. Life and Fire Ins. Co. vs. Johnson*, 4 Zab., 576) the point has been directly decided that it is not necessary for the plaintiff to prove an insurable interest in the life insured, and that if any interest were necessary, it need not be such as to constitute any direct claim upon the insured, but it would be sufficient if any indirect advantage might result from the life.

There was no statute in New Jersey, where this decision was made, prohibiting such insurances, nor is there any here. The insurance was not a mere wagering contract, and therefore cannot be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark; a valid contract of marriage was subsisting between them. Had he lived and violated the contract she would have had her action for damages; had he observed and kept the same, then as his wife she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid. The defense in this case is devoid of merit, and is not creditable to the defendant making it. There is no pretense that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement and obtaining the premium and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts.

The judgment should be affirmed. All the judges concurring.

# MISCELLANEOUS DEPARTMENT.

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## CASES REPORTED.

The present number of the JOURNAL contains a full report of the decisions in eight insurance cases.

The case of *Swick vs. The Home Life Ins. Co.* was tried in the United States Circuit Court for the Eastern District of Missouri. The suit was upon a policy of life insurance, and the defense of the company was a fraudulent assignment of the policy by the assured to the plaintiff, and false and fraudulent statements by the assured in the application, respecting his health and his habits in regard to the use of intoxicating liquors. The court held that the answers in the application were warranties, and that if they were untrue the policy was void, although the statements were not material, and although there was no intentional or fraudulent misstatements; that a distinction was to be made between untruthful answers and a failure to make full answers to such questions; and that the burden of proof was upon the company to show a breach of the warranty. The court also held that an assignment of the policy as security for a debt was valid, although the debt was much less than the amount of the insurance. The verdict of the jury was for the plaintiff. The law in regard to the burden of proof, in the case of warranties in life policies does not appear to be fully settled. The decision in this case is in conflict with that in *Price et al. vs. Phoenix Mut. Life Ins. Co.*, reported in the April number of this JOURNAL.

The case of *Cohen vs. The New York Mutual Life Ins. Co.*, decided in the Court of Appeals of New York, arose on a policy issued in 1849, to a citizen of Georgia. During the war the plaintiff was unable to pay the premiums. At the close of the war she made tender of the unpaid premiums, but the company refused to receive them, declaring the policy forfeited and cancelled. The plaintiff prayed that the policy might be declared valid, and that she might be permitted to pay the premium. The court held that she had a right to

maintain the action—although the husband, upon whose life the policy was issued, was still living—and indorsed the doctrine of the cases reported in this JOURNAL, of *Semmes, adm'r, vs. The City Fire Ins. Co.*; *The Manhattan Ins. Co. vs. Warwick*; and *Hamilton, ex'r, against this company*; holding that the policy was not invalidated by the effect of the war or the failure of the plaintiff to pay the premiums during the war, and that the company was bound to receive the premiums if payment was offered as soon as the plaintiff could legally make it. Several interesting questions arose, and are decided in the course of the opinion.

In *Thompson vs. The St. Louis Mutual Life Ins. Co.*, the Supreme Court of Missouri decide that where it is the practice of the company to accept premiums without objection, after the day stipulated for payment, it will be held to have waived the exact time as an essential ingredient of the contract, and that, although a note at the foot of the policy stated that if a premium should be received after a day specified for its payment, it should be considered an act of courtesy and should form no precedent in regard to future payments.

The main point arising in the case of *The Home Ins. Co. of New York vs. Heck*, related to the right of the company to cancel a policy upon a lot of cord-wood while the fires were burning in the surrounding forest. The court held that the company could not cancel the policy when a fire was approaching the property insured, or in the face of a threatening or approaching danger. The decision was rendered in the Supreme Court of Illinois.

The case of *Luce vs. The Springfield Fire and Marine Ins. Co.* was tried in the United States Circuit Court for the Western District of Michigan. The insurance was upon oil paintings, and the main question was one of construction; and whether the policy was an open or a valued policy.

*Schwartz vs. Germania Life Ins. Co.* was decided in the Supreme Court of Minnesota. The court held that where the agent has no discretion or duty, save only to deliver the policy upon payment of the premium, the transmission of the policy by the company to the agent is equivalent to delivery to the applicant, and that a tender of the premium to the agent will entitle him to the full benefit of the policy; but where the agent had instructions from the company, although such instructions were unknown to the applicant, that he was to deliver the policies to applicant provided he was in good health at the time of delivery, transmission of the policy to the agent would go no further than to signify an acceptance of the application on con-

dition that the applicant was in good health at the time of delivery. The question as to when a contract of insurance is completed is fully discussed in the opinion of the court.

In *Partridge vs. The Phoenix Mut. Life Ins. Co.* the plaintiff claimed certain commissions on renewed premiums, and to sustain his claim offered to show the usage between insurance companies and their agents. The Supreme Court of the United States held that local and limited usages and customs cannot be introduced into an express contract, which is reduced to writing, and is expressed in language neither technical nor ambiguous.

The case of *Chisholm vs. The National Capital Life Ins. Co.* which was decided in the Supreme Court of Missouri, arose on a policy for the plaintiff's benefit, upon the life of one Clark, between whom and the plaintiff a contract of marriage was existing. Clark died before the solemnization of the marriage, and the company refused to pay the insurance, on the ground that there was no insurable interest. The court held that there was an insurable interest, and that the company were liable. All the facts were known to the company at the time they issued the policy, and Judge Wagner, in giving the opinion, justly remarked as follows: "The defense in this case is devoid of merit, and is not creditable to the defendant making it. There is no pretense that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement, and obtaining the premiums and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts."

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[From the United States Jurist.]

#### JURISPRUDENCE AS AN ELEMENT OF SOCIAL SCIENCE.

It is somewhat difficult, when speaking of social science, as it is now understood, to give it a palpable form, or treat it otherwise than as an abstract something, of which we speak as we do of courage or patriotism, or the public good. Nor do we relieve it of this difficulty altogether, when, in analyzing the elements of which it is composed, we class among them the broad and prolific subject of jurisprudence. And it is only when we have traced the practical



extent to which the law enters into the structure, conduct, and good order of society, that we become aware how important the functions of this agency are in the ministry of social science.

My purpose, in attempting to point out the connection there is between the two, will be to show that law, though generally regarded as a special science, and in its study and application as limited to a few who are trained to its proper functions, borrows, in no small degree, its form and character from the prevailing sentiments and habits of thought of the sovereign from which it derives its authority. And that, in our country, where this source of authority is the people, their character and prevailing sentiment become the type of what the law is. So, in turn, the character of a people's laws acts directly upon that of the people themselves. The remark is historically true, that a people are never better than their laws; while it is equally so that a wise body of laws is often able to sustain a healthy tone of public sentiment, even amidst a deleterious atmosphere of luxury and vice.

It is in this way that we begin to perceive what important part men and women individually play, in every community in which they have the courage to think for themselves, in helping to form the public opinion which gives character and direction to the laws by which the whole State is governed.

To make this proposition more palpable, and at the same time to show the importance of a wise exercise of this power, we need only glance at some of the more obvious relations which subsist between the laws of a people and the moral and physical condition of the individuals who compose it. We need hardly to be reminded of the sense of insecurity of life or property which prevails in a community in which the restraints of government are not felt. The thought of originating or sustaining in such a community systems of education, or schemes of charity and benevolence, or even of providing safeguards for the public health and general comfort of the people, would simply be preposterous and absurd. It would be looking for the fruits of high culture amidst the tangled mazes of a trackless jungle. We have, then, only to start at such a state of human life, and mark the changes through which we reach the advancing grades and stages of civilization, up to the highest, to be sensible how the character of each of these may be measured by the condition of its government and its laws, and the manner in which these are administered. The foundations of society are unstable just in proportion to the want of steadiness and consistency in its government. No one feels safe in

the midst of a revolution ; and the worst possible condition of a people is a state of anarchy and licentiousness. In such a state, everything that goes to make up social science is arrested, and becomes of no account. Labor is without its protection or reward, the school is closed, improvement stops, vice stalks abroad, crime goes unpunished, and social advancement comes to a stand-still. In such a state of things, moreover, there is no one to enforce the regulations which public health demands, or to heed the lessons of experience, or the economies of trade and domestic industry. These are some of the results, socially considered, of the want of law ; while, in contrast to this, it is no less true, that the better and wiser the people's laws are, the more amply do they enjoy the benefits and blessings which flow from the institutions of which social science takes cognizance.

We start then with assuming, that law lies at the foundation of social improvement ; and in speaking of jurisprudence as an element of social science, we refer more especially to such parts of the law as are subsidiary to the great ends to which human society is, ultimately, aiming. While it makes the past secure, it is unceasing in its efforts to reach a still higher measure of excellence in the future. It is sufficient for our purpose, that the law under which we look for these results, is partly the fruits of legislation, but, to a much larger extent, is borrowed, in an unwritten form, from the changing condition through which society is passing, and the wants and necessities of trade and business. It is the province of jurisprudence, as it is here applied, to combine both these elements in one, and so to deal with them as to ascertain and apply the fundamental principles upon which they rest as a practical system.

Before entering, however, upon the subject in detail, it should be borne in mind that the character of a people's laws, as already intimated, depends, to a great extent, upon the moral and intellectual condition of the people themselves. So far as these laws are unwritten, they are little more than a reflex of the prevailing habits of thought and modes of business in a community. Whereas the character of the legislation of a State is prudent or otherwise, according as the legislator acts up to the true principles of social science. There are certain laws of physical as well as moral science, which legislators have, at times, vainly attempted to correct or control by the interposition of human legislation, where even a slight knowledge of the principles of social science would have shown them the futility of the attempt. Statutes and decrees have thus sought at times to suppress the guilt of heresy by the gibbet and the stake. And laws fix-

ing the hours or prices of labor, have undertaken to change the unwritten canons of political economy, which graduate those by the unerring standard of demand and supply in the market, in which labor is bought and sold.

The connection between law and social science may be illustrated, if we consider any one of the subjects-matter of that science. Take, for example, that of education. The law is constantly demanding those qualities and capacities of mind and heart, which can be best, if not alone, derived from culture and training. They are needed in every department of civil government. Ignorance on the part of its functionaries is altogether incompatible with a successful administration of its affairs. Where everybody, therefore, takes part in the functions of government, either directly or indirectly, the law virtually demands that every man shall be, to a certain extent, educated. It is required alike of the legislator, the magistrate, the juror, and the elector.

Social science and the general spirit of the common law, moreover, concur in the relations which they sustain in the family, such as those of parent and child, and master and servant. For its instrumentalities in provoking and supplying this education which the public good requires, social science is dependent upon such statutes as the wisdom of the legislature may provide. Our schools rest for their support upon the provisions of the statute-book. But the moment one of these is established, the common law comes in and supplements the statute, by defining the duties of the teacher and the pupil, and clothes the former with the requisite power of discipline for preserving order and enforcing his reasonable commands. Without these aids from the law, education would fail of its objects, and social science, to that extent, become little better than a dead letter. In this way social science and public law, in their co-operation in New England, have, at times, been a hundred years in advance of the activities of the old world.

Another illustration might be drawn from the condition of our public charities—the relief provided for the poor, and the watch and guardianship which the law keeps over the imbecile and the insane. Government in this way, with us, becomes itself what all governments have, at times, claimed to be, a great and all-embracing charity, taking care of those especially who cannot take care of themselves. How this duty of mutual service and relief shall be carried into effect depends upon the details which the law supplies. A portion of what those shall be falls under the cognizance of the common law, while

no inconsiderable part depends upon the wisdom of a people's legislation.

In one or the other form, our law secures to every man the fruits of his own skill and labor, as a means for his own support and that of his family. It imposes the duty of feeding and clothing the child upon the parent, till he is of an age to do it for himself; and beyond that, calls upon all whom fortune has favored with more than is needed for their immediate support to contribute of their substance for the comfort of such as, through vice, folly, or imbecility, must suffer or perish, if not cared for by the wisdom and benevolence of the law. And it is here that jurisprudence and social science meet upon a common ground, and work together for a common object. Social science lends its counsels, while jurisprudence provides the means of carrying them into effect. How, for, example, the poor are to be dealt with, has engaged the attention and thought of the best and wisest philanthropists and law-makers from the dawn of civilization to the present day. England has been legislating upon the subject since the days of Henry VIII., but has not yet solved the frightful problem. Statutes have multiplied by scores, and schemes without number have been devised to rid the country of the evil of pauperism; and the only result has been, that to-day every twentieth person in all England is supported at the public charge. In the Catholic countries of Europe, the Church acts as almoner for the poor, and instead of being shut up in large unions or receptacles, as in England, beggars are met with everywhere. But though neither of these measures reaches the sources of pauperism, they show, as a historical truth, that it is an evil which multiplies itself in almost a geometrical ratio, if not checked or regulated by proper legislation. In this way the jurisprudence of pauperism becomes an element of social science, which its friends and advocates cannot ignore if they would.

And in this connection a passing remark is due to a subject which at times has attracted public attention, that of compulsory education. There are those who deny such a right to government, on the ground that it is infringing upon the prerogative of the parent and interfering with the free agency of the child. This is reasoning upon altogether false premises. The child does not belong to the parent, in the sense of property and ownership. Nor is the obligation all on one side. If the father insists upon the services of his child, he is bound, in nature, to provide him with what is necessary to his moral and intellectual growth and health, as much as he is to feed and supply his

physical wants. But when we come to the claims of society upon him, this duty becomes even more imperative than when viewed in the light of a personal obligation. The parent is a citizen, at the same time that he is master in his own family, and as such is bound to observe the duties and obligations which he owes to the government under which lives. And experience has demonstrated, in a thousand different ways, that to maintain a free government a people must receive a certain amount of moral and intellectual training. It is as necessary in civil life as the drill and discipline of the soldier in the time of war. And a State has quite as strong a right to coerce its children to submit to the discipline of its schools, as it has to compel its adult citizens, in time of war, to come under the discipline of the camp. The only difficulty in this matter is to know where legislation shall cease, and to what extent the State may go in the legitimate exercise of its proper functions. And to do this wisely, legislation calls in the aid of social science, with its practical suggestions of experience and its lessons of sound philosophy.

But there is no subject, I apprehend, upon which it is so important that legislation and social science should harmonize, if action is to be had upon it, as that of labor. It enters so widely into the business affairs of every community, that men are disposed to take it for granted that a thing of such general interest may and ought to be regulated by some general laws. They forget that there are certain canons of political economy which are paramount to all municipal legislation, and as imperative and irreversible as the laws of nature itself. Any one who should put faith in the discussions which are going on among the operative classes in our own country or abroad, would be ready to conclude that, no matter how difficult a social problem may be—as, for instance, that of the relation of capital to labor—it only needs a few positive enactments to solve the difficulty and redress the wrongs which may grow out of their mutual dependence on each other. And so experiments are constantly being made to find a remedy by legislation for evils which even a limited knowledge of the laws of social science would show lie deeper than any empirical treatment can reach. That capital is, at times, unjust and oppressive, and, in its partnership with labor, seizes upon the lion's share of their earnings, everybody knows. Nor can it be denied that when this affects a class who cannot take care of themselves—such, for example, as children in manufacturing establishments, in respect to their attendance upon schools and their hours of labor—government is bound, upon every principle, to protect them by stringent laws. But to attempt to do this for men

who are free agents, and capable to judge as well as to act for themselves, would, in the end, be sure to defeat the purpose at which they aim. Take the case of the hours of labor. To limit those to a specific number per day or week, is reducing all who live by industry and skill to the lowest average standard or measure of power and production ; limiting the capacity of the man with robust health to the ability of one whose constitution has been impaired or his forces enfeebled. If, in the supposed interest of labor, this is carried so far that the dead capital of the employer cannot be turned to profitable account, the consequence must inevitably be to stop his works altogether, and thus diminish, to that extent, the ordinary demand for labor, thereby overstocking the market, and reducing the price it might otherwise command. In this way, every attempt to force up the price or diminish the hours of labor in the business of a community, beyond what would naturally result from the force and voluntary action of the employer and the employed, must, in the end, bring evil upon both.

It is here that social science comes in with its own laws, to supplement those of legislation. It teaches labor that its worst enemy is ignorance ; that the proportion of price between skill and brute force is always in favor of the former ; that the competition which hurts the laborer is not between the masters of trade or business, but between that large class of untrained and unskilled workmen who are content to do the drudgery of labor. To rise above this requires the laborer to be educated, and to make education free calls for the action of the Government. It must provide for the support of schools and institutions of technical science. And another effect of educating the laborer is to elevate labor itself, and to correct that false notion which, at times, has degraded it as a calling. So long as capital owned the laborer, and in order to do so kept him ignorant and dependent, labor itself partook of the character of those who performed it, and drove men to seek such departments of it only as had a factitious respectability attached to its pursuit. Stout and healthy men have shrunk from the dignified service of the farm and the workshop, to crowd and jostle each other as clerks in stores, and dealers in buttons and haberdashery. This condition of things has worked particularly hard upon the female labor of the country. In their aversion to domestic duties and employments, they are in constant competition with each other in what they are content to do, till their wages are measured by what will barely suffice them to support life.

If men and women were better educated in regard to the true dig-

nity of labor, there would be far more of equality in social rank than there now is, and far less of heart-burning and discontent with the condition in which they find themselves in relation to each other than are now indulged in by so many. Legislation, however, at best, can do little more than provide instrumentalities, which it leaves for social science to apply. Either, without the other, is but half a power. But in the war which humanity is waging with evil, in every form, it is only by the combined and harmonious action of both that men can hope to carry forward the reforms which aim to make the world richer and happier, by making it wiser and better.

EMORY WASHBURN.

### BOOK NOTICES.

OUTLINES OF AN INTERNATIONAL CODE.  
By David Dudley Field. New York :  
Baker, Voorhis & Company.

This work is presented in two parts. Book 1st is occupied with international relations during a state of peace, and Book 2nd treats of such modifications thereof as may be necessitated by a state of war. Perhaps the best thing to say of this effort, and the most fitting compliment to give to its author, is an expression of belief and confidence that if the principles enunciated in Book 1st are allowed to pass into practice, the function of Book 2nd will cease. Let international peace obtain by law, and war will speedily become obsolete. This magnificent thought seems to have inspired Mr. Field, for his work is not merely a codification of existing rules—it is a presentation of new and enlightened principles that hereafter shall influence the family of nations. To carry them out he would at present reduce armies and navies, abolish privateering, establish tribunals for the adjustment of public controversies by friendly arbitration, exempt, with but few exceptions,

private property from capture on sea as on land, and limit war to a species of monomachy. Should this ensue, an easy step would carry international civilization to that plane whence armies and navies would be viewed simply as *posse comitatus* executing a mandate at a world's court. Mr. Field, from his long experience as a codifier, is an authority in himself; but being undertaken under the auspices of the Social Science Congress, the subject will assume additional importance.

### MISCELLANEOUS.

#### WARRANTY.

The following syllabus of the opinion of Judge Yable is taken from the *American Law Times*, which contains the opinion in full :

#### SUPERIOR COURT OF CINCINNATI.

*Wilkins vs. The Tobacco Fire and Marine Ins. Co.*

Where a time policy of insurance upon a steamboat, insuring her against the perils of navigation and loss by fire, contained these provisions : "With permission to navigate the Ohio and Mississippi rivers below Cairo, Illi-

nois; coal oil clause waived," followed by a clause among the special warranties, containing the coal oil clause, stipulating as follows: "Warranted by the assured \* \* \* that the said vessel shall be run and navigated upon the aforesaid privileged waters, as is usual for boats of her class in the usual prosecution of business," and also containing other stipulations as to what things should but temporarily suspend the risk—deviation from the area of permitted waters not being among those mentioned—and where such insured boat, during the time covered by the policy, without the consent of the underwriter, made a voyage upon another river in safety than those specified as permitted, and was afterward, during the period of insurance, destroyed by fire, within the permitted waters,

*Held*, that the policy amounted to a warranty that the boat should navigate none other than the permitted rivers, as well as that she would navigate them in the usual way for boats of her class, and in the usual prosecution of business; that such warranty was broken by the unauthorized voyage on another river than those permitted, and that the insured cannot recover for the boat's subsequent loss by fire.

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#### SIR ROUNDELL PALMER.

Acts of self-sacrifice for conscience's sake, unfrequent at best, are perhaps rarest in political life. The exception to this rule should and does excite admiration. Sir Roundell Palmer, (now Lord Selborne,) England's great liberal lawyer, took a hold upon public esteem as almost no other politician has, when he refused the highest honors of his profession rather than violate his conscience. His rejection of the wool-sack, when its acceptance required a pledge to aid in the disestablishment of the Irish Church, has however not been without reward. Beyond the approval of his conscience, he has not only won golden opinions from all classes of people, but in Parliament stands higher than ever before. No longer a mere party man, his opinion carries

great weight, and often determines the victory. He is a grave, elderly man, of subdued and even melancholy appearance, gifted with a wonderful command of language, the effect of which is heightened by a clear, musical voice. Its "silken softness" is but one of the feminine characteristics of a man in whose temper and character there is much that is womanly, such as a deep reverence for religion, great tenderness of feeling, and just a tinge of jealousy. Allied to these gentle traits is a mind of the highest order, capable at once of commanding the subtlest niceties of argument and the broadest principles. Although the most successful of all chancery barristers recently in practice, the cause of his remarkable popularity is not obvious to an outsider. His graceful and fluent style, while pleasant to listen to, is not impressive, and in time becomes monotonous, and his very fluency often involves the simplest point of law in such a haze of language as to effectually conceal it from all but the keenest intellects. It is on record that on one occasion Sir Roundell, having been addressing a learned judge, without a pause from ten in the morning until two in the afternoon, and being still apparently as far from an end of his speaking as ever, was interrupted by the court with the words, "It would be a great assistance to us, Sir Roundell, if you would state what your point is." Unsurpassed in clearness and conciseness when necessary, he is unapproachable in his ability to hide the real point of a case when that is needed. An earnest churchman, he has shown his devotion by many sacrifices. But recently he bought an estate in the south of England, intending to erect a residence thereon, but learning that a church was needed in the district, he proceeded to build one before a single stone was laid in his own house. His "Book of Praise" is perhaps the best collection of hymns



in the English language. In the House of Commons he is as popular as in the court-room, speaking often with genuine eloquence. Though conservative on some questions, he is, on the whole, a thoroughly staunch Liberal. Standing at the head of his profession, and enjoying the esteem of all, his being "raised to the peerage" by the title of Lord Selborne has hardly increased his honors. The House of Commons has been robbed to enrich the House of Lords. As an evidence however that his present position as Lord Chancellor of England has not served to alienate his sympathies, we note his taking the chair at a workingman's meeting in a school-room at Liphook, which had assembled to take into consideration the formation of an industrial insurance society, on which occasion he proceeded to set forth the great advantage of life insurance.

#### LAWYERS AT THE CAPITOL.

The *American Law Times* says the national capital is, in respect to its professional citizens, wholly *sui generis*. It contains the best and the worst representative lawyers of the nation. The former occupy a place of their own, and are known chiefly in connection with judicial questions of a national character. The latter are ubiquitous, and are seen by every one who comes in contact with the surface of Washington society. They are gentlemen of desperate remedies and unlimited intellectual resource, many of whom have occupied governmental positions of profit and influence. They are invariably men of the largest experience, and, in some instances, of marked literary or social, and not unfrequently legal acquirements. Generally possessed of superior intelligence, they practice their profession as often from choice as necessity. One day rich and the next reduced to what less philosophi-

cal minds would suppose to be poverty their whole career is a grand contingent fee, the termination of which is as uncertain as the beginning. Every manipulation opens up a prospect of unequalled fascination, and when one has failed, persistent industry and cautious diplomacy supplies another.

#### PUBLIC LAND LAWS.

At the last session of Congress three important public land bills were passed.

1. In relation to *timber*. Any person planting and maintaining for five years, forty acres of timber, the trees thereon not being over eight feet apart, shall, having proved the same by two witnesses, be entitled to a patent to the quarter section containing the forty acres. Actual settlers, under the Homestead Act, for a term of three years and who for two years have had under cultivation one acre of timber (the trees similarly planted) to every sixteen acres of homestead, are entitled to a patent for the homestead.

2. *Soldiers' Homesteads*. Hereafter soldiers and sailors can enter one hundred and sixty acres in the "double minimum" lands, or within railroad limits. And all who have entered but eighty acres can enter eighty acres additional.

3. *For Church, Cemetery, School, or Railroad purposes*. Settlers, by pre-emption, or under the Homestead Law, have the right to transfer, by warranty against his or her own acts, any time after settling, without waiting until the five years shall have expired.

#### LONDON FIRES IN 1872.

Captain Shaw's annual report states the total number of calls for fires to be 1,671, being a decrease of 348 from

1871, and less than the average of ten years past by 53. About one sixteenth were false alarms, one twenty-third only chimney alarms, thirteen sixteenths of slight, and one fourteenth of serious importance. The ratio of serious fires has steadily decreased since 1866, when they were 25 per cent. Lives lost, 22—13 males and nine females. In addition to the above there were 3 265 chimney-calls, attended only by firemen with hand-pumps. The 50 fire-engines in the aggregate traveled 17,669 miles. To extinguish the fires 15,000,000 gallons, or 68,000 tons of water were used, three fourths of which was taken from the canals, river and docks. In 58 cases the water arrangements were unsatisfactory, viz., six short supply, 24 late attendance, and 28 no attendance. The work is performed by 50 steam fire-engines, 85 manual fire-engines, three floating engines, 84 miles of telegraph, 125 fire-escapes, and 396 firemen. Ranked as to locality, the order of the fires is private houses, lodgings, public houses, oil-men, grocers, tailors, cabinet makers, drapers, shoemakers, booksellers, bakers, stables, printers, green-grocers, railways, laundries, tobacconists, furniture dealers, gaming stock, carpenters, offices, unoccupied houses, houses under repair, builders, milliners, chandlers, beer shops, wagons, schools, public buildings, gas-works, ships, work-houses, hospitals. The principal causes of fire were candles, over-heated flues, etc., sparks, escapes of gas, lights thrown down, and lamps upset. A cat playing with matches occasioned one fire, fumigating bugs two fires. Most fires occurred on Saturdays, least on Sundays. Thursday was next to Saturday, being worse than Friday. Most fires broke out between eight and 11 o'clock at night. As to the time in the year, most occurred the weeks ending 14th January and the 7th July—the least in those ending 4th February and 19th May.

## MORTALITY OF LITERARY MEN.

The following is from a late number of the Parisian journal, *Galignani's Messenger* :

"Among the prizes lately awarded by the Academy of Sciences, there is one of the Montyon foundation, for statistics, which has been won by M. Potiquet. This gentleman has formed a complete catalogue of the ages of the academicians since the foundation of the institute in 1795, the periods at which they were named, and their mortality. A similar work of much greater extent had been compiled some thirty years ago by the late M. B. de Chateaufort, who had taken into account all the learned academies in Europe; but this immense task, which he did not live to finish, was necessarily incomplete, from the difficulty of finding many dates upwards of 200 years old, and other elements of importance. This work, nevertheless, such as it is, furnishes us with an interesting table of mortality of men of letters and science, which, compared with M. Potiquet's of the same nature, and that of the great French statistician De Parcieux, who only considers the duration of life in regard to tontines, yields results very favorable to the studious class. We give the following figures, showing the probabilities of life for such persons at different ages :

At Age.	Chateaufort.	Potiquet.	De Parcieux.
	Years.	Years.	Years.
35.....	32½	33½	31
40.....	29	30	27
45.....	25½	26	24½
50.....	21½	21½	20½
55.....	18½	18½	17
60.....	15	15	14
65.....	12	12	11
70.....	9½	9½	8½
75.....	9	7	6½
80.....	6	5	5
85.....	4½	4	3½
90.....	3½	2½	2

From this table we may gather a confir-

mation of a remark already made—viz., that literary and scientific pursuits are rather favorable to longevity than otherwise. According to it, M. Thiers, now 76, would still have seven years to live.—*Spectator*.

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#### PROFESSOR TYNDALL.

The college paper at Dartmouth, *The Andover*, speaks of Professor Tyndall, and the sources of his wonderful popularity as a lecturer, in the following terms :

"The elements of his unexampled success (in this country) were numerous. The attainments of the man himself, and the mere fact that he was a foreigner, the intrinsic interest and beauty of his subject, and the magnificent scale of his experimental illustrations, together with the ingenious advertising of Professor Youmans, all conspired to make his lectures the fashion ; and they have done great good, in New York especially, by making the wealth of the community respect and dignify science. The ill-natured jealousy exhibited in certain quarters was, to say the least, extremely foolish, and it is very fortunate that it did not succeed in checking the popular enthusiasm, for nothing can be more certain than that the whole effect and influence of Professor Tyndall's lectures will be to make scientific work in the United States more easy and more honored than even hitherto. As a scientific investigator and discoverer Professor Tyndall stands high, though hardly in the very first rank. His mathematical ability and attainments are not quite sufficient to give him place with Sir William Thompson, Stokes, Helmholtz, Weber, and others who might be named. But his discoveries in diamagnetism, (which secured his election to the Royal Society,) and his investigation upon the conduction and radiation of heat, and upon so-called actinic clouds, will always be classical. As a communicator

of scientific truth he is unsurpassed. To a thorough understanding of his subject and a warm enthusiasm in it, he adds a vivid imagination and a rare power of putting into words the pictures of his mind. Then he possesses the art of so speaking that no one notices voice or manner, but only the idea ; and this is perfect elocution, if not exactly after the American model. Personally, he is a fluent and agreeable talker upon a wide range of subjects in science, nature and art ; with just an amusing dash of English conceit and ignorance of the un-English world, but greatly interested in our country, its history and progress. Perfectly sincere, warm-hearted and generous, with none of that petty spite toward rivals which so disgraces some of the scientific celebrities of the day, he is respected and loved by all who know him."

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#### JUDGES AND THE PEOPLE.

The Supreme Court of Illinois, in consequence of a recent decision denying the constitutionality of the railroad law in that State, regulating fares, etc., has been loudly clamored against by the farming population. Notwithstanding this, a very large representation of the bar in the district of Judge C. B. Lawrence, whose term of office is about expiring, have solicited his candidacy for re-election. In his letter of acceptance Judge Lawrence discusses with marked fairness and dignity the impropriety of electing a judge solely with reference to the decision of a particular question in a particular way, which course of action is being urged by those in opposition to the railroads. The letter closes thus :

"I offer myself to the people as a candidate, but I can offer no pledges save the record of my past service, and the silent testimony of such character as I may have established during the many years I have lived in Illinois. If

I take my seat again upon the bench, I must do so as the representative of neither class, nor party, nor opinion, and with the hope, on my part, that in the performance of my judicial duties I may be as undisturbed by public clamor, or external influences of any sort, in the future, as I trust I have been in the past. If the people choose to re-elect me, I shall be grateful for the renewed expression of their confidence. If they do not, I trust they will select some one who will render them better service."

#### FARMERS' RAILROAD CONVENTION.

The Illinois Farmers' Convention lately held at Springfield, resolved :

*First*—That all chartered monopolies not regulated and controlled by law have proved in this respect detrimental to public prosperity, corrupting in their management, and dangerous to republican institutions.

*Second*—The railways of the world, except those countries where they have been held under strict regulation and supervision of government, have proved themselves as full of arbitrary extortion, and opposed to free institutions and free commerce between the States, as the feudal barons of the middle ages.

*Third*—That we hold, declare and resolve that this despotism which defies our laws, plunders our shippers, impoverishes our people, and corrupts our government, shall be subdued and made to subserve public interests at whatever cost.

*Resolved*—That we believe the State did not and could not confer any of its sovereign power upon any corporation, and that now is the most favorable time to settle the question, so that it may never be hereafter misunderstood, that a State cannot create a corporation that it cannot thereafter control.

*Resolved*—That we regard it as the un-

doubted power and imperative duty of the Legislature to pass laws fixing reasonable rates for freight and passage without classification of roads ; and that we urge upon our General Assembly the passage of such laws.

*Resolved*—That the existing statute providing for a classification of railroads, with a view to adjusting a tariff of charges according to the gross amount of earnings, is a delusion and snare, and is so framed that the railroads are able to classify themselves, and that it ought to be carefully modified or repealed.

*Resolved*—That inasmuch as the Supreme Court has clearly pointed out the way to reach unjust discriminations made by railroads of this State, we can see no reason for delay on the part of the Legislature in enacting necessary laws on the subject, and we urge immediate action thereon.

*Resolved*—That we urge the passage of a bill enforcing the principle that railroads are public highways, and requiring railroads to make actual connections with all roads whose tracks reach and cross their own, and to receive and transmit all cars and trains offered over their roads at reasonable maximum rates, whether offered at such crossings or at stations along their roads, and empowering the making of connections by municipal corporations for that purpose and for public use.

Among other delegates was Gov. Palmer, who is an advocate of the theory that railroads are public highways.

#### FEMALE LAWYERS.

Myra Bradwell, editor of the *Chicago Legal News*, applied for a lawyer's license in the State of Illinois. Although her application was regular, and her legal acquirements sufficient, she was refused admission to the bar on account of her sex. Claiming the right under the

14th Amendment, an appeal was taken to the United States Supreme Court. It was there decided April 15th, 1873, that the right to practice law was not a privilege within the amendment. Subsequently, however, to the initiation of the cause, the Illinois law having been changed, the lady was admitted to practice. In Wyoming, Utah, the District of Columbia, Missouri, Ohio, a similar right exists. The following is the law passed by the Illinois Legislature at its last session :

An act to secure to all persons freedom in the selection of an occupation, profession or employment.

*Be it enacted by the People of the State of Illinois, represented in the General Assembly*—That no person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex ; *Provided*, that this act shall not be construed to affect the eligibility of any person to an elective office.

#### THE GROWTH OF LONDON.

In view of the rapid increase in size and population of many of our cities and towns, particularly in the West, we are too apt to suppose that this increase is confined to this country ; but such is by no means the case. Many of the cities on the continent—Berlin, Hamburg, Vienna, Antwerp, etc., for example—are increasing rapidly in size ; but the city of London for several years past has presented a most remarkable instance of rapid growth. During the last ten years there were built *one hundred and forty-nine thousand nine hundred and five* houses. In order to furnish our readers with a more definite idea of this increase, we will state that this is a much larger number of houses than either New York or Philadelphia contains, more than twice the number in Liverpool, six times the number in Bristol or Dublin, and more houses than there are *people* in Dresden or Stockholm.—*Trade Journal*.

#### ITEMS.

Hon. Anthony Thornton has resigned his position as Judge of the Supreme Court of Illinois.

The State Auditor of Arkansas has appointed Lucien J. Barnes Insurance Commissioner of that State, under the recent act of the Legislature establishing an insurance bureau.

Edward Russell has been appointed to succeed W. C. Webb as Superintendent of the Kansas Insurance Department.

"The discovery of Life Assurance enables insurers, by the payment of certain small sums every year, in proportion to the benefit to be obtained, to make sure that so long as they keep up those payments, if they should be suddenly cut off, there will be a certain fixed provision for those they leave behind. Thus, the prudent saving of a small sum out of the year's income, of a moderate amount, places many a man who labors hard in his calling, and who knows the fruit of it will cease with his life, beyond the reach of care and anxiety on account of those for whom he has to provide."—*Sir Roundell Palmer*.

A thinking man is the worst enemy the Prince of Darkness can have ; every time such a one announces himself, I doubt not there runs a shudder through the nether empire, and new emissaries are trained, with new tactics, to, if possible, entrap him, and hoodwink, and handcuff him.—*Carlyle*.

The Wisconsin Assembly has passed the bill increasing the salary of the judges of the Supreme Court of that State to \$5,000.00.

## CURRENT TOPICS.

—We have received transcripts of decisions in the following cases :

*Raber vs. Jones.*—*Supreme Court, Ind.*

*Luce vs. The Springfield F. and M. Ins.*

*Co.*—*U. S. C. C., W. Dist. Mich.*

*Thompson vs. The St. Louis Mut. Life Ins. Co.*—*Supreme Court, Mo.*

*Partridge vs. The Phoenix Life Ins. Co.*

—*U. S. Supreme Court.*

*Chisholm vs. The National Capital Life Ins. Co.*—*Supreme Court, Mo.*

*Merchants' Mut. Ins. Co., of New Orleans vs. Syman et al.*—*U. S. Supreme Court.*

*Ripley, Adm'z, vs. The Railway Passengers' Assurance Co.*—*U. S. Supreme Court.*

*The Mut. Life Ins. Co., of New York, vs. Terry.*—*U. S. Supreme Court.*

*Hayward vs. The National Ins. Co., of Hannibal.*—*Supreme Court, Mo.*

*Philadelphia Trust etc. Ins. Co. vs. The Fame Ins. Co.*—*Supreme Court, Pa.*

*Franklin vs. The Globe Mut. Life Ins. Co.*—*Supreme Court, Mo.*

*In Matter of Boliver Owen et al.*—*U. S. C. C., E. Dist. Mo.*

*Holabird vs. The Atlantic Mut. Life Ins. Co.*—*Supreme Court, Mo.*

*The Washington Mut. Fire Ins. Co. vs. St. Mary's Seminary.*—*Supreme Court, Mo.*

*Jefferson Mut. Fire Ins. Co. vs. St. Mary's Seminary.*—*Supreme Court, Mo.*

—We are under obligations to Wm. H. Horner, Esq., of St. Louis, attorney for the appellee, for a brief in the case of *The Washington Fire Ins. Co. vs. St. Mary's Seminary.*

—Speaking of the London Fire Brigade, an organization remarkable for its skilled officers, its well-trained men, and especially for thoroughly accomplishing its work with less material than any oth-

er similar organization, the *Saturday Review* says : "It is a comfort to reflect that the Metropolitan Fire Brigade is one of the institutions of the country which nobody abuses at home, and every competent observer from abroad must admire. It owes its origin, as we have shown, to a voluntary association of insurance offices, and it is one of the most remarkable monuments of the capacity for organization of Englishmen not employed or impeded by Government."

—At its recent session, Congress appropriated \$3,500.00 for the purpose of paying the expenses of printing and publishing the Report on Life Insurance Statistics, to be compiled by Hon. William Barnes—a work assigned to him by the International Statistical Congress, at its recent session at St. Petersburg.

—The Mass. Humane Society has awarded their silver medal to Mary Ann Keyes for having by her presence of mind saved several girls at the Hanover Street fire.

—The Missouri law, like that of many States, requires from the insurance companies a deposit of \$100,000.00 with the State Treasurer. The German Mutual Life, of St. Louis, is, under a recent decision of the courts, held to be exempt from the operation of the law, on the ground that its charter, which establishes a different form of guaranty, antedates the law.

—The Supreme Court of Massachusetts has fixed upon July 15th, 1873, as the last day for receiving proofs of claims against the bankrupt Boston fire insurance companies.

—Hon. M. H. Pettet, late Lieutenant Governor of Wisconsin, adjourned the Senate of that State recently on a Friday, and on the Sunday evening following died at his residence of congestive

chill. He sustained a high reputation for capacity both in public and in private affairs. Seven years since he obtained a policy in the Home Life Insurance Company, of New York, for \$15,000.00, being the full amount granted by that company upon a single life.

—The National Life Insurance Company, of Chicago, has received certificate of authority to do business in the State of Ohio, after having been subjected to a thorough and exhaustive examination by the Superintendent, Hon. Wm. F. Church.

—Sam. H. White, Esq., having been chosen Vice-president and Treasurer of the Charter Oak Life Ins. Co., Halsey Stevens, Esq., succeeds him as secretary.

—A committee of the Amer. Railway Master Mechanics' Association have recently reported in reference to the subject of boiler incrustations, that the solution of the difficulty is still undiscovered.

—W. J. Cunningham, Esq., succeeds J. Merritt, Esq., as manager of the St. Louis department of the National Life, of Chicago—a worthy successor to a very competent agent.

—A correspondent of the *N. Y. Herald* suggests, as an appreciation of the conduct of the Rev. Mr. Ancient at the wreck of the Atlantic, the erection of a church for him near the scene of the wreck, the tower of which to be a light-house. It is further suggested that the above be supplemented with a paid-up endowment policy in a life insurance company.

—A certain distinguished actuary, who was formerly connected with a St. Louis Life Company, being asked whether there was any one there competent to conduct the company, replied "Oh yes! There is B.—and H.—and the porter—he has been there three or four years."

—A bill has passed both houses of the Legislature increasing the salaries of Chief Justice and each of the Associate Justices of the Supreme Court of Michigan, from \$2,500.00 to \$4,000.00 annually.

—Mrs. C. H. Nash, of Columbia, Me., having been admitted to the bar, has entered into partnership with her husband, under the firm-name of Nash & Nash, attorneys and counsellors at law.

—A Connecticut youth, who read in a Hartford paper of the large clerical force employed by one of the insurance companies, called at the office the other day with a young lady, and politely asked to have one of the clergymen marry them.

—A lawyer advertised for a clerk "who could bear confinement," and received an answer from one who had been seven years in jail.

—A Wisconsin judge wanted a divorce, and so filled one out and signed it. That is almost as cheap as they can be procured in Chicago.

—An able judge once said, "Nobody knows how much energy it requires, in a judge, to hold his tongue."

—Thirty-three men and forty women, over ninety years of age, died in New Hampshire during the year 1872.

—An active and reliable person wanted in every city and town throughout the United States to canvass and receive subscriptions for the *INSURANCE LAW JOURNAL*. The inducements we offer will amply reward any one for the time employed. Parties desiring to act as agents are requested to send us their names, with reference as to fitness and responsibility, on receipt of which the necessary documents will be forwarded. Address *Insurance Law Journal*, 176 Broadway, N. Y. P. O. Box 3686.

**TITLE**

# INSURANCE LAW JOURNAL.

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**VOL. II.**

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**No. 7**

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

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*From certified transcripts in our possession.*

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· AGENT.

§ 103. LIFE.—*Commission of—Usage and Written Contract—Evidence.*—The plaintiff was employed as agent of the company, and having been discharged, claimed a right to a certain commission on the renewal or annual premiums thereafter paid or to be paid on policies issued through his agency. On trial he introduced in evidence a letter from the company, written in reply to one asking information as to the precise relation which he bore to the company, and under which he had acted in taking the policies for which he claimed the additional commissions. This letter, among other things, contained the following: “Concerning your status in Missouri, it is simply this: you are working up a business for yourself, and are paid the highest commissions which we



pay." For the purpose of explaining the meaning of this phrase, or affixing to it a meaning which it did not bear on its face, the plaintiff offered to prove by competent witnesses that it was the usage between insurance companies generally and their agents in St. Louis, where the business of this agency was conducted, to pay the commission claimed. *Held*, that the incorporation of local and limited usages and customs into an express contract, whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in construction, amounts to establishing a principle that a custom may add to, or vary or contradict the well-expressed intention of the parties, made in writing. This is not consistent either with authority or the principles which govern the law of contracts. *Held*, also that the letter was neither ambiguous nor technical, and to have admitted the usage offered in evidence would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time.

*Partridge vs. Phoenix Mut. Life Ins. Co.\**

*Rep'd Jour'l p. 458.*

U. S. C. C.

§ 104. *LIFE.—Instructions to—Delivery of Policy—Statements in Application—Tender of Premium.*—The plaintiff applied to the company for insurance upon the life of her husband. The application stated that the present state of the husband's health was good; that he had never been afflicted with serious illness, and in answer to a question, stated that the plaintiff was aware that the contract of insurance became valid only by the payment of the first premium, and closed with a provision, among other things, that the policy should not become binding until the amount of premium as therein stated should be received by the company or some authorized agent thereof, during the lifetime of the party insured. The company accepted the application, and one policy having been sent and refused, a second was forwarded to the agent and received by him October 25th. On the 13th of October the husband was seized with a dangerous illness, of which he died on the 29th of the

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\* Decision rendered April 7th, 1878.

same month. On the same day the policy was received by the agent, and after its reception, the plaintiff called upon the agent, tendered the premium, and demanded the policy, which the agent refused to deliver on account of the husband's sickness. The policy provided that the first premium should be paid in hand, and the others annually, and that it was accepted on the express condition that it should be of no effect if the premiums or any of them were not paid on or before the several days thereinbefore mentioned, or within three days thereof. A note at the foot of the policy stated that agents of the company were not authorized to make, alter or discharge contracts, or waive forfeitures. There was evidence tending to show that the company's instructions to the agent were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of delivery. There was no evidence that the instructions were known to the plaintiff. *Held*, that if the agent "had no authority, discretion or duty in the premises, save only to deliver the policy upon payment of the first premium, then we can see no good reason why the transmission of the policy to him might not well be regarded as a signifying by defendant of its acceptance of plaintiff's proposition, nor any good reason why payment or tender of the first premium to such agent, even if delivery of the policy was withheld, would not have been completely effectual to entitle the plaintiff to the full benefits of the policy, to the same extent as if it had been manually and unconditionally delivered." *Held*, also, that it was "competent for the defendant to transmit its policy to its legal agent, with instructions, general or special, to deliver the same to the plaintiff upon payment of the first premium, provided her husband was in good health at the time of such delivery, and in such case the transmission of the policy to the agent would go no further than to signify the defendant's acceptance of plaintiff's proposition, on condition that her husband was in good health." *Held*, also, that the statements in the application as to the health and physical condition of the party "had reference to the state of facts existing or which had existed at the date of the application, not to any which might occur subsequently to such date." *Held*, also, that it was not necessary for the plaintiff to bring the

amount tendered into court, as the defendant could receive it as a deduction from any amount she might recover.

*Schwartz vs. Germania Life Ins. Co.\**

Rep'd Jour'l p. 449.

Mrs. S. C.

#### APPLICATION.

§ 105. LIFE.—*Acceptance of—Completion of Contract.*—The plaintiff applied to the company for insurance upon the life of her husband. The application contained the statement, in answer to a question, that the plaintiff was aware that the contract of insurance became valid only by the payment of the first premium, and closed with a provision, among other things, that the policy should not become binding until the amount of premium, as therein stated, should be received by the company or some authorized agent thereof. The company accepted the application and forwarded a policy to the agent. The policy provided that the first premium should be paid in hand, and the others annually, and that it was accepted on the express condition that it should be of no effect if the premiums or any of them were not paid on or before the several days therein mentioned, or within three days thereof. The agent offered to deliver the policy to the husband upon payment of the premium, but he refused to receive it. Afterward, at his request, the policy was returned to the company and a second policy was sent to the agent, like the first, except its provisions for the payment of premiums. It was claimed on trial that the second policy was a modification and part of a contract entered into by the first policy. *Held*, that "the application for insurance is a mere proposal on the part of the applicant. When the insurer signifies his acceptance of it to the proposer—and not before—the minds of the parties meet, and the contract is made. This acceptance must be signified by some act."

*Heiman vs. Phoenix Mut. Life Ins. Co.*, 17 Minn., [1 Ins. Law Jour'l, 415.]

When the agent offered the first policy to the husband, who was

\* Decision rendered April 3rd, 1873. To appear in 18 Minn.

acting for the plaintiff, upon payment of the premium, the company thereby signified its acceptance of the plaintiff's proposition. *Held*, also, that the refusal to pay the premium "was a refusal by plaintiff to comply with the terms of her own proposition. It was a repudiation of the proposition—a rejection of the proffered acceptance, and in effect and fact a refusal to receive the policy at all. Plaintiff having thus repudiated her own proposition, and refused to comply with the condition upon which defendant signified its acceptance of her proposition as the basis of a contract of insurance into which defendant offered to enter by delivering its policy, defendant, so far as any obligation or liability to plaintiff was concerned, stood precisely where it would have stood if it had never accepted plaintiff's proposition, conditionally or otherwise."

*Schwartz vs. Germania Life Ins. Co.*

—§ 104.

#### COMPROMISE.

§ 106. FIRE.—*Agreement for.*—The defendant insured the plaintiff's assignor against loss or damage by fire on his oil paintings. After the fire the general agent and adjuster of one of the three other companies which had issued policies upon the same property, and who represented himself as acting for all the companies interested, entered into an agreement with the insured that the companies would pay *pro rata*, and that he should accept \$3,000.00 in full satisfaction of the four policies. The evidence showed that the agent was not authorized to bind the defendant. *Held*, that the agreement of compromise "must have been one which would operate as a satisfaction of the contracts of insurance, before such agreement can be offered as a defense to an action on the policies. A compromise agreement, like accord and satisfaction, in order to take away the right of action on the original contract, must be an agreement which is substituted for the pre-existing obligation. It must bind both parties, so that suit may be maintained by either to enforce the same."

*Luce vs. The Springfield Fire and Marine Ins. Co.\**

Rep'd Jour'l p. 448.

U. S. C. C., DIST. MICH.

\* Decision rendered March. 1873.

## EVIDENCE.

§ 107. *LIFE.—Custom of Company—Instructions to Agent.*—The company issued a policy upon the life of the plaintiff's husband, which the plaintiff refused to receive. A second policy was afterward sent by the company to its agent, which the plaintiff demanded, making tender to the agent of the first premium. The agent refused to receive the premium and deliver the policy on account of the husband's sickness. On trial there was evidence tending to show that the company's instructions to the agent were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of delivery. The vice-president of the company, in his evidence, in answer to an interrogatory, stated that it was a custom of the company not to deliver or send policies to agents for delivery, except upon condition that the person whose life was to be insured was in good health. *Held*, that the interrogatory and answer were properly excluded. Unless this custom was shown to be known to plaintiff, or to have been communicated to the agent as instructions, it was immaterial. *Held*, also, that as the question whether the instructions were given to the agent was a question of fact, the two policies, notwithstanding the signatures were cancelled, together with the correspondence in reference thereto between the company and its agent, were properly received in evidence as documentary history of the transaction between the parties in reference to the subject of the action.

*Schwartz vs. Germania Life Ins. Co.*

— 104.

## INSURABLE INTEREST.

§ 108. *LIFE.—Wager Policy—Contract of Marriage.*—The company issued and delivered a policy to the plaintiff upon the life of Clark, between whom and the plaintiff a contract of marriage was then existing. The policy was made payable to the plaintiff as the intended wife of Clark, and she was to pay the annual premiums, and did pay the first and only one. While the policy was in force, and before the marriage had been solemnized, Clark

died. *Held*, that “in this State we have no statute on the subject, covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy.” *Held*, also, that “the insurance was not a mere wagering contract, and therefore cannot be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark; a valid contract of marriage was subsisting between them; had he lived and violated the contract, she would have had her action for damages; had he observed and kept the same, then, as his wife, she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid.” *Held*, also, that “an uncertain interest in the life of the person insured is sufficient to support and uphold a policy in favor of another for whose benefit it was taken.”

Lord vs. Dall, 12 Mass., 118; Trenton Mut. Life and Fire Ins. Co. vs. Johnson, 4 Zab. 576.

*Chisholm vs. National Capitol Life Ins. Co.\**

Rep'd Jour'l p. 461.

S. C. Mo.

## OWNERSHIP.

§ 109. FIRE.—*Wood*.—The insured had a contract with a railroad company, by which he was to deliver and pile wood on the line of the railroad, for which the company was to pay a stipulated price. The company had no control over the wood, but as it was needed, the agent of the company took as much as he wished from the piles, without saying anything to the insured, measured it, and sent a voucher for it to the general office, and it was paid for in from twenty to sixty days. *Held*, that the wood was the property of the insured.

*The Home Ins. Co., of New York, vs. Heck.†*

Rep'd Jour'l p. 487.

ILL. S. C.

## PLEADING.

§ 110. LIFE.—*Set-off*.—A sum of money in the plaintiff's hands was admitted to be due the defendant if plaintiff's claim was not

\* Decision rendered April 21st, 1873.

† Decision rendered February 7th, 1873.

established, and no objection was made in the Circuit Court to pleading it as a set-off. *Held*, that as no objection was made in the Circuit Court, none can therefore be made here. *Held*, also, that "defendants in the Circuit Courts of the United States can avail themselves of the laws which prevail in the State concerning the right of set-off generally."

Ward vs. Aurora City, 6 Wallace, 139.

Partridge vs. Phoenix Mut. Life Ins. Co.

—4 108.

### POLICY.

§ 111. LIFE.—*Avoidance of—Payment of Premiums after Due—Waiver.*—The defendant in 1867 issued a policy upon the life of the assured, whereby, in consideration of \$230.28, and an annual premium of the same amount to be paid on or before the 28th day of March in each year for nine years, it agreed to pay the sum of \$3,000.00, at the expiration of the nine years, or if the assured should die in the meantime, in ninety days after due notice and proof of death. The policy provided that if there should be a default in the payment of any of the annual premiums when due, the insurance should be commuted to such proportional part of the whole sum as the sum of the payments made should bear to the amount of the ten annual payments stipulated to be paid. At the foot of the paper upon which the policy was printed and written, but not embodied in the policy itself, was the following printed memorandum: "N. B.—Agents of this company are not authorized to grant permits, or to make, alter or discharge contracts, or waive forfeitures. If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments." The evidence showed that the premium due on the 28th of March, 1870, was not paid or tendered on that day, but that in two days thereafter it was duly tendered and refused; that at the time the tender was made there had been no change in the health or condition of the assured; that the previous annual premiums upon the policy had always been paid by

the plaintiff weeks after they became due, and were received by the company without objection, and that it had been the practice of the plaintiff to pay the premiums upon another policy in the company, in force during the same time as this policy, long after they became due. The assured died April 27th, 1870. *Held*, that "in contracts of insurance, as in other contracts, the parties may make the time of the performance of any stipulation of the very essence of the contract. In such case the contract becomes utterly at an end or void as soon as the default is made. The stipulation in regard to the time of the payment of the premiums in this policy I do not regard as of the essence of the contract. It was not so regarded by the parties themselves. By their acts and conduct the parties have construed this contract for themselves." *Held*, also, that "the memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if we may consider it as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the plaintiff to disregard the exact day of payment and to rely upon the courtesy of the company. The plaintiff pursued this course, and instead of making payments on the very day when due, let them lie over for a short time, and still they were received without objection. The plaintiff was thus induced to believe that a failure of strict payment on the day would not prejudice his rights." *Held*, also, that "in regard to the payment of premiums, it seems to be well settled that the practice of the company in accepting the same without objection after the day stipulated for the payment, must be treated as a waiver of the exact time as an essential ingredient of the contract."

Buckbee vs. United States Ins. Co., 18 Barb., 541 ; Reese vs. Mutual Benefit Life Ins. Co., 26 Barb., 556 ; Helme vs. Philadelphia Life Ins. Co., 61 Penn. State, 107.

*Thompson vs. The St. Louis Mut. Life Ins. Co.\**

Rep'd Jour'l p. 422.

Mo. S. C.

§ 112. *LIFE.—Character of, as a Contract.*—The company insured the life of the plaintiff's husband, in consideration of an

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\* Decision rendered April 21st, 1873.



annual premium to be paid on the 2nd day of April, in each year, until the death of the assured. The policy provided that if the annual premiums should not be paid on the 2nd day of April of each year, the policy should cease and determine, and that all previous payments made thereon should be forfeited to the company. *Held*, that "this was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit: the payment of the annual premium." "It was a life policy."

*Hodson vs. Guardian Life Ins. Co.*, 97 Mass., 144; *Reese vs. Mutual Benefit Life Ins. Co.*, 26 Barb., 556; *New York Life Ins. Co. vs. Clopton*, 7 Bush., 179.

*Held*, also, that "the contract was not, as to all its stipulations, and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured." *Held*, also, that "the contract was a continuing contract, in the sense that it was to be performed in the future, but it was not a contract of continuance in its performance." "The act to be performed by the plaintiff was a single act to be performed at stated periods, and was not like the contract of partnership, and some other contracts, which are continuous in their performance."

*Cohen vs. The New York Mutual Life Ins. Co.*\*

Rep'd Jour'l p. 426.

N. Y. C. A.

§ 113. FIRE.—*Cancellation of, under Threatening Danger.*—The company, organized in the State of New York, insured a quantity of cord-wood, which was piled upon the line of a railroad. The policy provided that the company might cancel the policy on notice and return of the unearned premium. The agent of the company, while fires were burning in the surrounding clearings and forests, notified the insured of the cancellation of the policy. The court below refused to transfer the cause to the United States Court on the affidavit of the defendant. *Held*, that the company had a right to cancel the policy on giving

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\* Decision rendered January 21st, 1873. To appear in 50 N. Y.

notice and returning the unearned premium, although the wood was in greater danger at the time than when it was insured. The insurer cannot however cancel the policy when the fire is approaching the property insured, or in the face of a threatening and approaching danger. *Held*, also, that it was error to instruct the jury that if the agent of the company notified the plaintiff, before the loss, of its intention to terminate and cancel the policy, the plaintiff could not recover, and also that it was error to instruct the jury that if the agent believed the wood was not being protected against the fires with that degree of care which a man of ordinary prudence and caution would use, and that in consequence of such want of care, there was danger that the wood would be destroyed, he would be justified in cancelling the policy. *Held*, also, that as the petition and affidavit for the transfer are not made a part of the record by the bill of exceptions, this court cannot regard them.

*The Home Ins. Co., of New York, vs. Heck.*

—§ 100.

#### PRIOR INSURANCE.

§ 114. FIRE.—*Consent of Company to—Estoppel.*—The policy provided that if the insured should have, or should thereafter make any other insurance on the property, without the consent of the company indorsed on the policy, he should not be entitled to recover any loss or damage which might accrue to the property insured. The insurance was obtained through the agent of the company, who was also its vice-president, and agent of several other companies, and who had procured two other policies for the insured upon the same property, one of which was in force at the time the policy was issued by the defendant, and the existence of which was known to the president and secretary of that company. *Held*, that the insured had a right to expect, under these circumstances, that the company indorsed upon the policy its consent to the insurance existing on the property at the time of its issue. Good faith required the company to do this. "The defendant considered the whole matter in reference to the insurance already on the property, and took the risk in reference thereto, and then should be estopped from setting up the breach

of said condition as a defense to the action, said breach having been waived."

*Hayward, assignee, vs. The National Ins. Co., of Hannibal.\**

*Rep'd Jour'l p. 508.*

Mo. S. C.

### SUBSEQUENT INSURANCE.

§ 115. FIRE.—*Consent of Company to—Notice to Agent—Waiver—Estoppel.*—The policy contained a provision that if the insured should have or should thereafter make any other insurance on the property without the consent of the company indorsed on the policy, he should not be entitled to recover any loss or damage which might accrue to the property insured. The insured afterward, on the expiration of a prior policy on the same property, took out another in its place, and informed the agent of the defendant, who had procured the policy, and who knew at the time of his intention to keep up the full amount of his insurance, of what he had done, and was told by him that it was all right. *Held*, that notice to the agent was notice to the company, and his assent amounted to a waiver, on the part of the company, of the condition in the policy avoiding the same if additional insurance was taken without the consent of the company indorsed upon the policy. *Held*, also, that "in these late cases it has been held that the condition in the policy under consideration, as well as other conditions of similar nature, may be waived by the company, and that the waiver may be made as well 'by acts as by positive declarations, and that the company may be estopped, under certain circumstances, where by a course of dealing, or its open actions, it has induced the insured to pursue a policy to his detriment.' "

*Horwitz vs. The Equitable Mutual Ins. Co.*, 40 Mo., 557; *Franklin vs. The Atlantic Fire Insurance Co.*, 42 Mo., 456; *Combs vs. Hannibal Savings and Ins. Co.*, 43 Mo., 148; *Northrup vs. The Mississippi Valley Ins. Co.*, 47 Mo., 435; *Viele vs. Germania Ins. Co.*, 26 Iowa, 54-55; *Walsh vs. The Aetna Life Ins. Co.*, 30 Iowa, 133; *Van Bories vs. The United Life, Fire and Marine Ins. Co.*, 8 Bush, (Ky.) 133.

*Hayward, assignee, vs. The National Ins. Co., of Hannibal.*

—§ 115.

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\* Decision rendered March 31st, 1873.

## VALUED POLICY.

§ 116. FIRE.—*Construction—Written and Printed Portions.*—The defendant insured the plaintiff's assignor against loss or damage by fire to the amount of \$2,500.00 on his oil paintings, consisting of landscapes and portraits, as per schedule. The schedule enumerated 105 paintings, and opposite the name of each was placed an amount, as \$1,000.00, \$3,000.00, etc., without further words or explanation. In the printed portion of the policy was the following clause: "Said loss or damage to be estimated according to the true and actual cash value of said property at the time the same may happen." *Held*, that "this policy runs very close to the dividing line between an open and a valued policy, but after much consideration, it is my opinion that it is not a valued. Such a policy determines beforehand the amount for which the insurer is liable in case of loss, and it is inserted in the policy as a fixed sum to be paid if loss occurs. It does more than merely value the property insured—it values the loss. To do this the policy must amount to a contract, either to pay, in case of loss, a stipulated sum, or that the property shall be estimated at a stipulated sum in case of loss. Such seems, fairly stated, to be the rule of the books."

Flanders on Fire Insurance, 45; Phillips on Insurance, §§ 1178, 1180, 1213; Harris vs. The Eagle Fire Ins. Co., 5 Johns., 368; Laurent vs. Chatham Fire Ins. Co., 1 Hall N. Y., 52, 53; Wallace et al. vs. Ins. Co., 1 Bennett Fire Insurance, 412.

*Held*, also, that if in the schedule before the sign of dollars in each instance some word or words, as "worth," "value," or "agreed value," had been inserted, indicating that the figures represented agreed values, this might be held to be a valued policy. "The tendency of the cases is to hold that valuing the property values the loss, and is in the right direction." *Held*, also, that "if the written part of the policy is inconsistent with the printed portion, the latter must give way to the former is a well-established rule in reference to policies of insurance, but I am unable to say that there is any inconsistency, and certainly the rule is well settled that the different classes must be made to

harmonize if possible. They are not inconsistent, but in harmony, when read together."

*Luce vs. The Springfield Fire and Marine Ins. Co.*

—§ 106.

#### WAR.

§ 117. LIFE.—*Effect of, on Life Insurance, on Contracts, on Contracting Parties—Mutual Companies and Partnership.*—The defendant, a mutual life insurance company, incorporated in the State of New York, insured the life of the plaintiff's husband, a resident of Savannah, Georgia. The policy, issued in 1849, provided that if the annual premiums should not be paid on or before the 2nd day of April, of each year, the policy should be void and all previous payments forfeited. The payments were duly paid until April 2nd, 1862, when, on account of the war, the plaintiff offered to pay the premium to a former agent of the company at Savannah, who refused to receive it. No further premiums were paid until the close of the war. Upon the close of the war the plaintiff made tender of the unpaid premiums, but the company refused to receive them, declaring the policy forfeited and cancelled. The plaintiff prayed that the policy might be declared valid, and that she might be permitted to pay the premiums. *Held*, that there is no reason why a contract of life insurance should necessarily be terminated by the happening of a war between the States of which the parties are respectively subjects, as unlawful and inconsistent with the state of war. *Held*, also, that "had the insured died at any time before April, 1862, I think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war."

Phill. Int. Law, 666; Nelson, J., Prize Cases, 2 Black, 635, 687; Wheat. Int. Law, 8th ed., 408, § 317.

*Held*, also, "that the war was the act of the States, and that individual citizens are not identified with their government so as to expose them to the rule of law that he who by his own conduct prevents the fulfillment of a contract, or renders its per-

formance impossible, shall not take advantage of a non-performance on the other side, or excuse the non-performance upon his part."

*Odlin vs. Ins. Co., of Pennsylvania*, 2 Wash. C. C. R., 312; *Francis vs. The Ocean Ins. Co.*, 6 Cow., 404; S. C. in Error, 2 W. R., 64.

*Held*, also, that "there is nothing in the policy of the law or the interest of the public calling for an enforcement of the law of confiscation incident to a state of war, after the war has ceased and the people of the two belligerent nations have again become one, solely for the benefit of one of the two contracting parties by the forfeiture of the rights of the other." *Held*, also, that "whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership."

*Cohen vs. The New York Mutual Life Ins. Co.*

—§ 112.

§ 118. LIFE.—*Effect of, on Contracts, on Payment of Premiums—Right of Action before Loss.*—The defendant, a company incorporated in the State of New York, insured the life of the plaintiff's husband, a resident of Savannah, Georgia. The policy, issued in 1849, provided that if the annual premiums should not be paid on or before the 2nd day of April of each year, the policy should be void, and all previous payments forfeited. The premiums were duly paid until April 2nd, 1862, when, on account of the war, the plaintiff offered to pay the premium to a former agent of the company at Savannah, who refused to receive it. No further premiums were paid until the close of the war. Upon the close of the war, the plaintiff made tender of the unpaid premiums, but the company refused to receive them, declaring the policy forfeited and cancelled. The plaintiff prayed that the policy might be declared valid, and that she might be permitted to pay the premiums. *Held*, that "an individual by his covenant may undertake as against his own acts and the acts of strangers, but not against the acts of God, or his government, or of the obligee."

Nelson, Ch. J., *People vs. Bartlett*, 3 Hill, 570; *Wolfe vs. Howes*, 20 N. Y., 197.

*Held*, also, that if performance is made "absolutely unlawful, it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation."

*Brewster vs. Kitchen*, 1 Ld. Raymond, 317; Ld. Alvanley, Ch. J.; *Touteng vs. Hubbard*, 3 B. & P., 291.

*Held*, also, that "that which will avoid a covenant will nullify a condition, and *vice versa*."

*Platt on Cov.*, 569; *Doughty vs. Neal*, 1 Saund., 214, N. (2.)

*Held*, also, that "at the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payments, but the effect of the war was to make the attempt unlawful, without any fault on her part," and that she was relieved from the consequences of failing to pay the premiums upon the days they became due.

*Semmes vs. Hartford Ins. Co.*, 13 Wall., 158.\*

*Held*, also, that "no injustice is done the defendant in this case by permitting the plaintiff to make now the payments which she could not lawfully make between 1861 and 1865."

*Manhattan Life Ins. Co. vs. Warwick*, 20 Grattan, 614; † *New York Life Ins. Co. vs. Clopton*, 7 Bush., 179; *Hamilton, ex'r, vs. The Mut. Life Ins. Co., of New York*. ‡

*Held*, also, that the plaintiff has a right to maintain an action at this time, although there has been no loss and therefore no cause of action upon the policy.

*Baylies vs. Payson*, 5 Allen, 473; *Ball vs. Coggs*, Brown's Parl. R., 296; *Buxton vs. Lister*, 3 Atk., 383; 2 Story on Eq. Jur., § 826.

*Cohen vs. The New York Mutual Life Ins. Co.*

—§ 112

\* 1 Ins. Law Jour'l, 668.

† 1 Ins. Law Jour'l, 115.

‡ 1 Ins. Law Jour'l, 578.

# REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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## SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1871.

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*Appeal from Superior Court of Cook County.*

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THE MERCHANTS INS. CO., OF CHICAGO, *Appellant,*

vs.

EZEKIEL MORRISON, *Appellee.\**

The defendant on the first day of April issued a valued policy upon the plaintiff's vessel and furniture, while in harbor, from noon of that day to noon of the 30th day of the next November. The policy contained an express warranty that she was then in safety, and that she was to be employed in the freighting and passenger business, and was to navigate only the waters and tributaries of the lakes, and the river St. Lawrence. Among the perils insured against were fires, and among those mentioned as excepted were, besides other legally excluded causes, rottenness, inherent defects, overloading, and all other unseaworthiness.

The vessel remained in port, after the policy was issued, until the 10th of April, when she made her first voyage and continued in the lumber trade until the 8th of the next October, upon which day she was destroyed, while lying at the dock, by a fire, which was not the result of unseaworthiness.

It was not requisite that the vessel should be seaworthy when she set out upon her first voyage, in the sense of that term as applied to voyage policies, in order to make the policy attach and charge, the insurance for a subsequent loss by fire, not arising from want of seaworthiness.

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\* Decision rendered February 7th, 1873.



It is a peculiar rule of the law merchant and the common law, that every voyage policy implies a warranty of seaworthiness. This warranty relates to the beginning of the risk, and that is when the vessel sails. Seaworthiness at the commencement of the voyage is a condition precedent, and if it does not then exist, the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause.

These are inflexible arbitrary rules of the common law, and are applicable to risks of that character upon our lakes, as upon the high seas. These rules do not apply to time policies.

This policy is substantially different from the usual voyage policy, and the vessel-owner, if insurance companies choose to concur in his wishes, has the legal right to adopt the substitute, and enjoy it, if fairly obtained, untrammelled with the incidents which the law attaches to a voyage policy. Judgment affirmed.

McALLISTER, J.

In June, 1868, the appellee being engaged in the lumber business at Muskegan Lake, in Michigan, became the owner of the *then* propeller "Omar Pasha."

This lake is situate some five miles from the east shore of Lake Michigan; is connected with the latter by a navigable river called the Muskegan River, constitutes a safe harbor, and is known as the port of Muskegan.

During the remainder of the season of 1868, after appellee became the owner, the propeller was employed by him in the lumber trade between that port and Chicago. At the close of navigation the vessel was taken to the Muskegan harbor, where she remained until the 10th of April, 1869. During the winter of 1868-9 she was thoroughly overhauled, repaired, and changed into a lumber-barge; the work and repairs costing upward of ten thousand dollars. On the 1st of April, 1869, while the vessel was still in that harbor, through the action of an insurance agent and solicitor, a policy of insurance upon the body, tackle, apparel, and other furniture of this vessel was issued by appellant to appellee, insuring the same in the sum of three thousand dollars, from noon of the first day of April, 1869, to noon of the 30th day of November, 1869. This was a valued policy, containing an express warranty, on the part of the assured, that the vessel was then in safety; that she was to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie and Ontario, and river St. Lawrence to Quebec, usually navigated by vessels of her class, during the portion of the life of the policy between noon of April 1st and noon of November 30th. The perils insured against were of the lakes, rivers, canals, fires, and jettison, excepting all perils, losses, misfortunes or expenses

consequent upon and arising from or caused by the following or other legally excluded causes, viz.: \* \* \* "Incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing and securing the cargo of said vessel, rottenness, inherent defects, overloading, and *all other unseaworthiness*," etc. The policy contained the usual recital of payment of the premium. The vessel remained in the port where the repairs had been made, where she was at the time the policy issued, and until the 10th day of April, 1869, when, being laden with a cargo of lumber, she set out upon a voyage to Chicago. She continued engaged in the lumber trade between those ports until the 8th day of October, 1869, and then, while lying at a dock in the Muskegan harbor, and during the life of the policy, she was consumed by fire, not the result of unseaworthiness. The usual protest, proof of loss and abandonment necessary to charge the underwriters having been made, and the appellant having refused to pay the amount insured, this action was brought upon the policy. The cause was tried before the court and a jury. After hearing the evidence, which was conflicting, the jury returned a verdict in favor of the assured, upon which judgment was rendered and the case brought to this court by appeal.

A single question of law has been presented and discussed in this court. Upon the trial the court permitted the insurance company to introduce evidence tending to show the want of seaworthiness of the vessel during the season of 1869; but with the avowed purpose of showing that she was unseaworthy at the time of setting out upon her first voyage after the insurance. Many witnesses were examined as to this point upon both sides. But when we consider the presumption of law that she was seaworthy; the clear and satisfactory evidence of the thorough overhauling and repairs which she had received immediately previous to setting out upon such voyage, and contrast the strength of appellee's case with that sought to be made by appellant, it seems to us that the clear weight and preponderance of evidence are with the appellee. Nevertheless, there was sufficient to warrant appellant in asking the court to submit the question of fact to the jury if the counsel were right in their law as involved in the following instruction, which the court refused: "The jury are instructed that the law implies a warranty, on the part of the plaintiff, that the Omar Pasha was seaworthy on setting out upon her first voyage after the time from which the policy was to take effect, provided she set out on such voyage from a port in which proper repairs could have been made; and if they believe from the evidence

that she was not seaworthy when she left such port on such voyage, they will find for the defendant."

The refusal to give this instruction forms the basis of appellant's argument. The policy we have seen was made on the 1st day of April, 1869, whereby the vessel was in terms insured against certain perils, among which were those of fire, from noon of that day. Under these circumstances did the law imply a warranty that the vessel should be seaworthy when she set out upon her first voyage from that port? and was it requisite that she was seaworthy at that time in the sense of that term as applied to voyage policies, in order to make the policy attach and charge the insurer for a subsequent loss by fire not arising from want of seaworthiness? We think not. To so hold would not be the mere recognition of a condition to the policy by implication of law, and in respect to which the contract was silent, but would be to vary its terms and legal effect. It is a general rule of law that when parties have deliberately put their engagements into writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing. 1 Greenl'f Ev., § 275. There was no attempt to interpret or explain any of the terms of the policy by offering proof of any known and established usage respecting the subject, so that the position assumed must have its foundation, if it have any, in the peculiar rule of the law merchant and the common law, that every voyage policy implies a warranty of seaworthiness. Then what is that warranty? It imports that the ship is staunch and sound, of sufficient materials and construction, with sufficient sails, tackle, rigging, cables, anchors, stores and supplies; a captain of competent skill and capacity; a competent and sufficient crew; a pilot when necessary, and generally that she is in every respect fit for the voyage insured. This warranty relates to the beginning of the risk, and that is when the vessel sails. 2 Greenl'f Ev., § 400; 3 Kent's Com., 289. And it is the general rule that the vessel must be seaworthy in the sense mentioned, at the commencement or inception of the risk, in order that the policy attach and charge the insurer. Seaworthiness at the commencement of the voyage is a condition precedent, and if it does not then exist, the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause. Prescott vs. Un. S. Ins. Co., 1

Whart., 399 ; Starbuck vs. N. E. Ins. Co., 19 Pick., 199 ; Capen vs. Washington Ins. Co., 12 Cush., 517.

These are inflexible arbitrary rules of the common law, and are as applicable to risks of that character upon our lakes as upon the high seas. But their applicability to time policies was seriously questioned, if not denied, in *Capen vs. Washington Ins. Co.*, above cited, and Chief Justice Shaw pointed out some of the distinctions between the two kinds of policies with his usual clearness and force. Afterward the case of *Gibson vs. Small* came up in the English House of Lords, 24 Eng. L. and Eq., 17, involving the question of implied warranty of seaworthiness in the case of a time policy in the sense of its application to a voyage policy. The subject was most elaborately discussed by the several judges, and the distinguishing features of the two kinds of instruments were pointed out with admirable perspicuity. There, however, the policy was upon a vessel in an unknown sea, and in an unknown condition. But in the case of *Thompson vs. Hopper*, 6 El. and Bl., 172 ; 34 Eng. L. and Eq., 266, the action was upon a time policy, issued upon a vessel in port, where the owner resided ; and the court held that there was no implied warranty of seaworthiness, which, if broken, would prevent the policy from attaching. See also *Jones vs. Ins. Co.*, 2 Wallace, J., 278. The question was examined in the English courts with so much research and ability that it would be idle if not presumptuous to attempt to throw any further light upon it. But it seems to us that the reasons assigned by the English judges against the implication of such a warranty in the case of time policies on vessels engaged in the general and ceaseless commerce of the great oceans or high seas, apply with even greater force to those on vessels engaged upon our northwestern lakes. Because here, from the rigor of the climate, vessels are generally compelled to lie, during the cold season, some four or five months in ports or harbors, imbedded in ice, and where the principal peril to which they are exposed is that of fire, and against which it is lawful for the owner to obtain insurance. But the circumstances would require a policy essentially different from the usual voyage policy. It might be expedient to make the policy cover the whole time during which the vessel was to so lie in harbor, and also that of the ensuing season of navigation. To be fully applicable to the circumstances the policy should be made to cover the perils of fire as well as of the lakes, rivers, etc. Suppose the owner, while his vessel is fast in the ice of a Michigan or Chicago port, should obtain a policy on the 1st day of January, in-

sure her against all the perils suggested, from noon of that day until noon of the 30th day of the following November. Would there be any reason in support of the position that such a policy implied a warranty of seaworthiness, as that warranty has been defined ; or for holding that the operation of the policy was suspended ; that the risk did not commence until the vessel set out upon her first voyage in the spring, and that if she was not *then* seaworthy, the policy never attached at all ? Yet that is the precise doctrine of appellant's instruction. It is manifest that to so hold would be to say, that upon this subject parties were not competent to make such a contract as they thought fit ; that whatever might be the necessities of the case, or the terms of their contract, still the law would so control it as to make it speak a particular language, and *that* the same as another contract which they did not make. The policy would declare in plain language that the risk commenced and the policy became operative at noon of the first day of January ; but the courts, that the risk did not commence or the policy become operative, no matter how fairly obtained, unless the vessel was seaworthy when she sailed upon her first voyage in the spring.

This is the proposition embodied in the instruction which appellant's counsel asked the court to give, the refusal of which by the court they have endeavored to convince us was error. The instruction is not based, it will be observed, upon the hypothesis that the vessel was about to depart on a voyage when the policy issued, and the principle involved in it is all the same, whether the policy was made ten days or three months before the vessel sailed. It would lead to great embarrassment if the vessel owner cannot obtain a policy like that in question without its being arbitrarily subjected to the same rule incident to voyage policies. Aside from the circumstance of the vessel lying ice-bound for several months, is the further circumstance that much of the commerce upon the lakes is carried on between ports which are not remote from each other. Hence voyages are short, and quickly and frequently made. In such case there would be an obvious inconvenience in the use of voyage policies. This inconvenience, together with the other peculiarity of navigation upon the lakes we have mentioned, dictate the propriety of seeking a substitute for the usual voyage policy in another form of contract, which, in the very necessities of the case, must be substantially different. Such a contract is the one sued upon in this case. We are of opinion that the vessel owner, if insurance companies choose to concur in his wishes, has the legal right to adopt

the substitute and enjoy it, if fairly obtained, untrammelled with the incident which the law attaches to a voyage policy.

There was therefore no error in the rulings of the court below. The evidence sustains the verdict and the judgment must be affirmed.

Judgment affirmed.

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## SUPREME COURT OF MISSOURI,

MARCH TERM, 1873.

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*Appeal from Hannibal Court of Common Pleas.*

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JOHN T. K. HAYWARD, ASSIGNEE OF JOHN A. LENNON, *Appellant*,

vs.

THE NATIONAL INS. CO., OF HANNIBAL, MISSOURI, *Respondent*.\*

The policy provided that if the insured should have or should thereafter make any other insurance on the property, without the consent of the company indorsed thereon, he should not be entitled to receive any loss or damage which might accrue to the property insured.

The insurance was obtained through the agent of the defendant, who was also vice-president of that company, and agent of several other companies, and who had procured two other policies upon the same property for the insured, one of which was in force at the time the policy was issued by the defendant, and the existence of which was known to the president and secretary of that company at the time. The insured accepted the policy without ever looking at it, and afterwards, upon the expiration of the policy in force at the issuing of defendant's policy, took out another one in another company, and informed the agent, who knew of his intention to keep up the full amount of his insurance, of what he had done, and was told by the agent that it was all right.

The insured had a right to expect, under the circumstances, that the company had indorsed upon the policy its consent to the insurance existing on the property at the time of its issue. The defendant should be estopped from setting up the breach of the condition, the breach having been waived.

The agent had notice of the insurance procured after the issue of the defendant's policy, and assented to it. Notice to him was notice to the company, and his assent amounted to a waiver, by the defendant, of the condition in the policy, avoiding the same if additional insurance was taken without the consent of the company indorsed upon the policy.

In late cases it is held that the condition in the policy, and similar conditions, may be waived by the company, and that the waiver may be made as well by acts as

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\* Decision rendered March 31st, 1873.

by positive declarations, and that the company may be estopped, under certain circumstances, as where by a course of dealings or its operations it has induced the insured to pursue a policy to his detriment. *Hutchinson vs. The Western Insurance Company* (21 Mo., 97) overruled. Judgment reversed.

GEORGE H. SHIELDS AND THOMAS H. BACON, *for Respondent.*

ARTHUR B. WILSON AND HATCH & HATCH, *for Appellant.*

VORIES, J.

This action was brought on a policy of insurance charged to have been executed by the defendant to John A. Lennon (plaintiff's assignee) on the 25th day of July, 1868, and by which the defendant, in consideration of the sum of twenty-one dollars paid by the said Lennon to defendant, did undertake to, and did insure the said John A. Lennon, for the period of six months from the date of said policy, against loss or damage by fire to the amount of three thousand dollars, on his stock of merchant tailor's goods, consisting, etc.

The pleadings are very lengthy and prolix, but for the purposes of a decision on the points presented to this court for adjudication, it will only be necessary to state the following issues made by the parties, and which were passed on by the court below.

The defendant in its answer, amongst other things pleaded therein, set up the following special defenses: "For a seventh defense herein defendant says, that amongst other considerations in said policy sued on, it was an express condition in said policy as to the property on which said policy was issued, that if said Lennon should have, or should thereafter make, any other insurance on the property thereby insured, or any part thereof, without the consent of the company indorsed thereon, then, and in every such case, the said Lennon should not be entitled to recover from the company any loss or damage which might accrue in or to the property thereby insured, or any part or portion thereof, and defendant says that said Lennon did not keep said express condition, but broke the same in this, that at the time when said Lennon made his request for insurance on which said policy was issued, and at the time said policy was executed and delivered by defendant, the said Lennon had other insurance on said property than the insurance alleged in plaintiff's petition; that is to say, insurance in the ——— Insurance Company, of ———, for the sum of three thousand dollars, without defendant's consent to said other insurance indorsed upon said policy sued on, nor did defendant ever consent to said other insurance, and defendant says that thereby said Lennon became not entitled to re-

cover from defendant any loss or damage which occurred in or to said property or any part or portion thereof.

The eighth defense set up by defendant is the same as the one above set forth, except that the breach of the condition is charged to be that said Lennon, after the execution of the policy sued on and its delivery to said Lennon, made other insurance on said property in the sum of three thousand dollars in the Phoenix Insurance Company, of Hartford, Connecticut, without the consent, etc.

The plaintiff, in his replication to these defenses, admits the condition in the policy as stated, and that said Lennon had at the time of the execution of the policy other insurance on the property insured, in the sum of \$3,000.00, as stated in the answer, but to avoid the effect of the supposed breach as stated by the defendant, the plaintiff avers, "That before and at the time of the issuing of said policy, defendant well knew, and was fully advised of the fact of such other insurance on said property, and plaintiff avers that the defendant, at the time it issued its said policy and received the premium therefor, from said Lennon, waived the condition in said policy requiring notice of other insurance to be given to it, and furthermore waived the condition of said policy requiring the consent of such other insurance to be indorsed on said policy in writing, and plaintiff further avers that defendant, at the time aforesaid, consented to said other additional insurance."

To the eighth defense set up in defendant's answer as above stated, the plaintiff replied: "That he admits that after the time of the issuing of the policy sued on, to wit: on the — day of —, and at the time of the expiration of said previous additional insurance above referred to, the said John A. Lennon, with the knowledge and consent of the defendant at the time, procured in place of said previous additional insurance, the same amount of insurance, to wit: in the Phoenix Insurance Company, of Hartford, in the State of Connecticut, and last-named insurance was in force at the time of the burning of the goods named in plaintiff's amended petition, of which facts defendant had full knowledge, and was fully advised of the renewal thereof in another company, and consented thereto, and plaintiff avers that defendant at said time waived the condition in said policy sued on, set out in defendant's eighth ground of defense, requiring notice of additional insurance to be given to defendant, and then and there waived the requirements of said condition requiring defendant's consent to such additional insurance to be indorsed on said policy in writing."

There were many other issues in addition to the above in the plead-



ings, but they are not brought in question in this court, so that it will only be required that I should state the substance of the evidence applicable to the foregoing issues and the ruling of the court thereon, to give a fair understanding of the matter complained of by the appellant, and upon which he relies for a reversal of the judgment in this cause.

It appears from the evidence in the cause that at, and before, the execution of the policy sued on to John A. Lennon, that Lennon was doing business in the city of Hannibal as a merchant tailor. That his stock of goods amounted to from seven to eight thousand dollars. That one David S. Eby also resided in Hannibal, and followed the business of an insurance agent. That he was agent for several insurance companies in the Eastern States, as well as being agent at Hannibal for defendant. That said Lennon had taken two policies of insurance from said Eby for three thousand dollars each, one in each of two Eastern companies for which Eby was agent, and that he had transacted the business with and procured the policies from said Eby. That in the month of July, 1868, shortly before the making of the policy sued on, Eby told said Lennon that one of his policies of three thousand dollars was about to expire, and that he could not renew it at the same rates that he had been charged before. Eby testified that he was the vice-president of the defendant, and agent for several insurance companies, had his office in the same room with the president and secretary of defendant, that he was in the habit of taking risks for the defendant, most generally in consultation with the other officers of the company; when the risks were out of the ordinary run of business there was a general consultation; that he thought he was authorized by virtue of his position as agent to take risks generally. Haynes, the president, and Meadows, the secretary of defendant, were both apprised of the issue of the policy to Lennon upon which the suit is brought, before it was issued. Eby further stated that he was carrying six thousand dollars on Lennon's stock. A short time previous to the expiration of one policy, he had a conversation with Meadows and Haynes; told them that there was an opportunity of taking three thousand dollars on Lennon's stock, as he could not renew it in the company that it was in; after consultation with the company they agreed to take the risk. The company knew that he was carrying the six thousand dollars insurance for Lennon at the time; did not know whether he received the premium from Lennon or whether the company received it. When Lennon was informed that one of his

policies was about to expire, and that it could not be renewed at the same rate as before, he told Eby that he wanted it renewed, and requested him to continue it ; said he had too much stock on hand to suffer any of his insurance to drop. He said he had about \$8,000.00 in stock or over ; that he wanted the policy continued.

The evidence further shows that after Eby had the consultation with the other officers of defendant, that he made out the policy upon which this suit was brought, and when the old policy had expired he handed it to Lennon, who objected to it ; said he did not want to be put in the National, but that Eby assured him that it was a good company, and he then received it, telling him that he took it on his word ; that he never examined the policy until after the fire which destroyed his goods. The evidence further tends to show that Eby continued to be agent and vice-president of the defendant until after the month of September, 1868. In September, 1868, Eby was, as agent of an Eastern company, still carrying the three thousand dollar policy on Lennon's goods, in addition to the policy in suit ; that at said time said policy was about to expire. Eby told Lennon that the policy was about to expire and that he could not renew it at the same rates paid before. Lennon said he wanted the policy renewed. Eby told him to wait a few days and he might still be able to renew it. That afterward, on the day the policy expired, Eby told Lennon he was then prepared to renew the policy. Lennon told him that he was too late, that he had just insured in another company, and thus renewed the amount of the three thousand dollar policy. Eby told him that that was all right. Eby states that he thinks he was still vice-president and acting as agent of defendant at the time of this last conversation.

The foregoing is substantially the evidence in the cause in reference to the knowledge and consent of defendant as to the three thousand dollar insurance on the property in addition to the policy sued on, either at the time of the execution of the policy by the defendant, or at the time that said insurance was changed to the Phoenix Company in September afterward.

The question presented for the consideration of this court is whether the evidence in this case, or the circumstances under which the policy sued on was executed and delivered to Lennon was such as to amount to a waiver of the condition in the policy that the policy should be void or no recovery had thereon if the insured should have other insurance on the same property which was not made known, and not indorsed on the policy. And whether the condition was

waived that required notice to be given and indorsement made thereon on the policy, of any additional insurance being afterward made on said property. Or whether the defendant was estopped from setting up the breach of said conditions as a defense to the action.

In my mind there can be very little doubt as to the three thousand dollar policy which existed on the property at the time the policy was executed by the defendant. Eby, the agent and vice-president of defendant, had executed and delivered to Lennon two policies as agent for Eastern companies, one of which was about to expire. Lennon wanted it renewed, but Eby could not renew it on terms to suit. This being the case, he had a consultation with the president and secretary of defendant, in which he informed them of the whole matter, and that there was a chance for the defendant to take a risk for three thousand dollars on Lennon's goods in place of the policy about to expire. After a full consultation they concluded to take the risk, and the policy was made out before Lennon was seen on the subject, and the same afterward handed to him, who hesitated to receive it until he was assured that the company was a good, responsible one, when he accepted the policy without ever looking at its contents, as the evidence shows. It was evidently known by all parties that the remaining three thousand dollar policy was to continue on the property insured, because Lennon had informed them that he could not afford to let any of his insurance be dropped. Lennon had a right to expect, under these circumstances, that defendant had indorsed on the policy its consent to this remaining policy of three thousand dollars, good faith required it under the circumstances to have done. So far as this prior insurance is concerned, the case comes exactly within the principle laid down in the case of *Horwitz vs. The Equitable Mutual Insurance Company*, 40 Mo., 557. The defendant considered the whole matter in reference to the insurance already on the property, and took the risk in reference thereto, and then should be estopped from setting up the breach of said condition as a defense to the action, said breach having been waived.

In reference to the renewal of the insurance at a time subsequent to the execution of the policy sued on by the defendant, or the changing the same to another company, the evidence is not so clear of an intention to waive the condition requiring the defendant's knowledge and consent thereof to be indorsed on the policy. It is contended by the defendant that it was not notified of said subsequent insurance, and that it never, in any way, assented thereto. While on the other hand, it is contended by the plaintiff that the evidence

shows that defendant had full notice of the subsequent insurance and assented thereto, and so acted as to induce the said Lennon to rest in security, in the belief that his property was fully insured.

The main question in the case is whether notice of this subsequent insurance to the agent who effected the risk for defendant, will be considered as a notice to the defendant, for I think that the evidence clearly shows that Eby was still vice-president and agent for the defendant at the time this last insurance was effected. At least if there were any doubts as to his agency at the time, that fact ought to have been submitted to the jury by a proper instruction.

The authorities upon this last question are somewhat in conflict and cannot well be reconciled with each other. The cases referred to by the defendant in the Massachusetts courts, and in other cases referred to, seem to accord with the views entertained by the defendant.

In the case of the General Insurance Company vs. United States Insurance Company, 10 Maryland, 517, the question was as to notice by the corporation of an unrecorded deed of mortgage so as to effect a subsequent mortgage. It is there held that the notice in such case must be sufficient to put a party on inquiry, and that conceding that a director of the corporation to be affected had notice of the prior mortgage it did not appear that he had communicated the notice to the board of directors, and was therefore not sufficient. That the notice received by a director of a corporation in a private way, or which he acquired from rumor, would not bind the institution. That the case must be so clear as to satisfy the mind that the allowance of the subsequent claim would be a fraud on the party setting up the first deed. And to the same effect is the case of Farrel Foundry vs. Dart, 26 Conn., 376. The case of the Worcester Bank vs. Hartford Insurance Company, 11 Cush., 265, was a case where the policy sued on contained a clause almost precisely similar to the claim in the policy of defendant under consideration. It was held that in such case, where a subsequent insurance had been obtained, and the agent of the company notified thereof, and who had promised the assured to have the consent of the subsequent insurance entered on the policy, but failed to have it done, that still the policy is avoided, the technicalities of the contract not having been complied with; and to the same effect are several other cases in Massachusetts.

It is contended by the defendant in this case that no notice to an agent of the company could operate as notice to the defendant, unless the agent received the notice at a time in which said agent was engaged in the execution or performance of the business to which the

notice related ; or unless it is shown that the agent communicated the notice to his principal. To sustain this view of the case, reference is made to several cases.

In the case of *McCormack vs. Wheeler*, 36 Ill., 114, (referred to by the defendant,) it is held that notice to an attorney of one party, of which he acquired knowledge while acting as the attorney of another party, is not such notice as will affect his client. It is remarked by the judge delivering the opinion in the case, that "The English authorities manifest a disposition to depart from this rule, but it is deemed by the court to be a rule just in itself."

In the case of the *Mechanics' Bank vs. Schaumburg et al.*, 38 Mo., 228, Judge Holmes, delivering the opinion of the court, states, "that knowledge acquired by the president, cashier and teller, while engaged in the business of the bank in their official capacity, will be notice to the bank so far as either has authority to act for the bank ; his acts are the acts of the bank ; and his official knowledge is the knowledge of the bank. But mere private information obtained beyond the range of his official functions will not be deemed notice to the bank."

It is difficult to exactly understand what is meant by the language used in these decisions. The defendant contends that it is meant by the decisions referred to, as well as other decisions using similar language, that no notice served on an agent will be effectual to bind his principal unless the agent should receive the notice while actually engaged in the transaction of the very business to which the notice relates, or unless it is shown that it was communicated to the principal. If that should be the proper construction to be given to the language, then it would become impossible that an agent of an insurance company could ever be notified of a subsequent policy of insurance being issued upon the same property before insured by said agent for his principal. Every agent as soon as he takes a risk and issues a policy therefor, and delivers it to the insured, dismisses the subject of that policy from his mind. If the insured should afterward procure a subsequent insurance on the same property, and go to the agent to give him notice thereof, he would be sure to find the agent in the transaction of some other business, when, according to the construction given to these cases, no notice could be given to the agent because he was not at the time engaged in the particular business to which the notice related, and this, notwithstanding the agent was the only agent of the corporation whose business it was to attend to the very matter to which the notice related.

I think that this is not the proper construction to give to these

cases. The meaning must be that the notice must be given to the agent while his agency exists, and it must refer to business which comes within the scope of his authority. When this is the case, I think that notice to the agent is notice to the principal ; in fact, there is no other way to notify a corporation than to notify an agent. A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent, and generally it is sufficient to notify an agent whose proper business is to attend to the matter in reference to which the notice is given.

In the opinion of Judge Holmes in the case of the *Bank vs. Schaumberg et al.*, above referred to, Story's Agency, Sec. 140, is referred to, from which it may be seen what was meant by the language used in that decision. The section referred to reads as follows :

" Upon a similar ground, notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject matter of his agency ; for upon general principles of public policy it is presumed that the agent has communicated such facts to the principal ; and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal ; otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party. But unless notice of the facts comes to the agent while he is concerned for the principal in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal, for otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory, at the time of undertaking the agency. Notice therefore to the agent, before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

This quotation from Story seems to me to solve the whole question, which is, that notice to the agent before his agency has begun, or after it has terminated, will not ordinarily affect the principal. If notice is given before the agency has begun to affect the principal, it must be so near before it that the agent must be presumed to recollect it. This rule, as laid down by Judge Story, I think is the correct one, and must be the proper interpretation to be given to the language used in the cases on the subject.

Now to return to the facts of the case under consideration, we find that Lennon, in the month of July, 1868, had procured from one Eby, two policies of insurance for \$3,000.00 each, one in each of two East-

ern companies, for which said Eby was agent. That said Eby was also agent for defendant, having authority to take risks and issue policies for it. That one of the Eastern policies was at said time about to expire. That Eby informed Lennon that he could not renew the policy on the same terms that the policy had been issued before. Lennon insisted that he wanted the policy renewed ; that he could not afford to drop any part of his insurance ; that he was not then fully insured ; that his stock of goods was heavy, etc. Under these circumstances, Eby communicated the facts in reference to this matter to the president and secretary of defendant, telling them that one of Lennon's policies was about to expire, and that there was a chance for defendant to take the risk for three thousand dollars in place of the policy about to expire. After full consultation it was concluded to take the risk for the \$3,000.00, and a policy was executed to Lennon therefor, without any application on his part therefor, and in fact, without his knowledge, and that when it was delivered to him he first objected to receive it, but upon being assured by Eby that the company was a good one, he received the policy. At this time it was well known to Eby and defendant that Lennon intended to continue the one Eastern policy upon his goods, and that he did not intend in any way to lessen or diminish his insurance. This being the case, sometime in the month of September or October of the same year, when the second or last Eastern policy was about to expire, Lennon was informed by Eby (who the evidence shows was still agent of defendant) of the fact, and that he could not renew it on the same terms that it had been originally issued. Lennon expressed a desire to have the policy renewed ; wanted to keep up his insurance. Eby at this time told him to wait a few days, that he might yet be enabled to renew the policy. Lennon did wait until the day that the policy expired, and then insured in another company in the same amount, and upon meeting with Eby, he informed him of what he had done, and was told by Eby that it was all right.

Now under these circumstances had Eby, the agent, notice at the time of the change of the policy procured from him in the Eastern company for the policy to the same amount in the Phoenix Company, and did he assent thereto? And did such assent amount to a waiver on the part of the defendant of the condition in the policy, avoiding the same where additional insurance is taken without the consent of defendant indorsed on the policy as has been before stated? That Eby knew of the new policy there can be no doubt; in fact, it was known by Eby and the officers of defendant at the time

of the issuing of the policy sued on, that Lennon intended to continue the whole six thousand dollars of insurance on his stock of goods. The policy of defendant was made with that view, and what was afterward done was only carrying out the understanding had between the parties at the time ; hence when the policy was about to expire, Eby told Lennon that the policy was about to expire, and that he could not then renew it on the same terms, but to *wait* a few days, that he might still become able to renew it. Why was it that Eby asked him to wait? It was, to my mind, because it was known and expected that if Eby did not renew the policy, the insurance would be taken in another company, and this was only a continuation of the original understanding and was expected by Eby, and when he had been told that it had been done, he answered that it was all right.

Eby was at the time still the agent of the company, and notice to him was notice to the defendant.

In a late case in the State of Illinois—Illinois Mutual Fire Insurance Company vs. Malloy, 50 Ill., 419—the policy in question contained a clause to this effect : “ If the insured shall thereafter make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the insurers, and have the same indorsed on the policy or otherwise acknowledged by them in writing, the policy shall cease and be of no further effect.” The assured in that case did effect an additional insurance on the same property. It was held that it was not sufficient in such case to give notice to a stranger who had long ceased to be an agent of the company. The court, however, in rendering the opinion, says : “ Had the party notified been the agent of the company, his failure to indorse consent on the policy would not have prejudiced the assured, as we said in the case of Fire and Marine Ins. Co. vs. Schettler, 53 Ill., 166.” It was, however, further held in that case that the party notified was agent. This case seems to sustain the view that a notice to one who is known to be an agent is sufficient to charge the company; and that where notice is given of an after insurance, and no objection made at the time, that the policy will not be thereby forfeited.

I do not say that the fact that Lennon told Eby, after he had taken the last policy, that he had given the risk to another company would have been sufficient of itself to constitute a waiver of the condition in the policy in question, but this fact taken in connection with all of the other facts connected with the transaction I think is sufficient; and that to permit the defendant to insist on a forfeiture of the



policy under all of the circumstances would be to enable it to perpetrate a fraud on Lennon.

In the investigation of this case it has not been overlooked that this court, in the case of *Hutchins vs. The Western Insurance Co.*, 21 Mo., 97, held that a condition in a policy similar to the one under consideration, was a condition precedent to the right of the insured to recover on the policy, and that nothing would prevent a forfeiture of the policy but the actual indorsement of the consent of the insurer to the subsequent insurance. Subsequent cases, however, in this court, as well as in other courts, which seem to have been well considered, have recognized a more liberal rule in favor of the insured. In these late cases it has been held, that the condition in the policy under consideration, as well as other conditions of similar nature, may be waived by the company, and that the waiver may be made as well "by acts as by positive declarations, and that the company may be estopped under certain circumstances where, by a course of dealing or its open actions, it has induced the insured to pursue a policy his detriment." *Horwitz vs. The Equitable Mutual Ins. Co.*, 40 Mo., 557; *Franklin vs. The Atlantic Fire Insurance Co.*, 42 Mo., 456; *Combs vs. Hannibal Savings and Ins. Co.*, 43 Mo., 148; *Northup vs. The Mississippi Valley Ins. Co.*, 47 Mo., 435; *Viele vs. Germania Ins. Co.*, 26 Iowa, 54-55; *Walsh vs. The Ætna Life Ins. Co.*, 30 Iowa, 133; *Van Bories vs. The United Life, Fire and Marine Ins. Co.*, 8 Bush, (Ky.), 133.

The Common Pleas Court, on the trial of this cause, instructed the jury "that it devolved on the plaintiff to show that consent was given by the company to such other insurance, and indorsed on the policy sued on, and unless the jury find from the evidence that such consent was indorsed on said policy sued on, they will find for the defendant." This instruction assumes that no waiver of the condition in the policy could be made by the company; but the jury are told that unless the indorsement of consent was actually made on the policy, they must find for the defendant. This instruction was clearly wrong, and ignored the whole issues in the case to which it referred, as made up by the pleadings. It is, however, said that this instruction was modified by another instruction given by the court. This, upon examination, will be found to be incorrect. There is no instruction given by the court that could be construed to be a modification of the one above referred to. There is another instruction which tells the jury that if the policy securing the additional insurance had expired before the loss, that then, al-

though the consent of the company to the same was not indorsed on the policy, the plaintiff might recover. This instruction only applied, and could only apply, to the insurance existing on the property at the time of the issuing of the policy sued on, as there was no pretence that the subsequent procured policy had expired; and the first instruction referred to was complete in itself, and so far as the instruction given by the court, to which reference is made, differs from it, it is merely inconsistent with the other instructions given, and calculated to mislead and confuse the jury.

It is not necessary that any further notice should be taken of the instructions given or refused; the case must be reversed for the erroneous view taken of the case in the instruction referred to.

The other judges concurring, the judgment of the Hannibal Court of Common Pleas is reversed and the cause remanded for a new trial.

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UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

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*In Error to the Circuit Court of the United States for the District of Louisiana.*

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THE MERCHANTS' MUTUAL INS. CO., OF NEW ORLEANS, )  
Plaintiffs in Error, )

vs.

ASAHEL P. LYMAN AND DAVID SWINESTONE.\*

The defendants issued a policy on the 15th of January, insuring a brig for two months, from the 1st of January, the date of the expiration of a former policy. The plaintiffs at the time they applied for the policy knew of the loss of the vessel, which had happened after the expiration of the former policy, but did not inform the company of the fact. The plaintiffs claimed that they made a verbal contract with the company on the 31st of December to renew the insurance.

*Held*, that the company were entitled to the information the plaintiffs had of the loss of the vessel, and that no action could be sustained on the policy, and that

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\* Decision rendered April 28th, 1873.

the taking of the policy and causing the defendant to sign it under such circumstances was a fraud.

*Held*, that the terms of the contract having been reduced to writing—signed by one party and accepted by the other at the time the premium was paid—neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to verbal negotiations which were preliminary to its execution.

*Held*, that the party who has destroyed the validity of the contract by his own fraud cannot for *that reason* treat it as if it had never been made and recover on the verbal statements made before its execution. Judgment of the Circuit Court reversed.

WM. M. EVARTS, *for Plaintiffs in Error*.

T. J. DURANT, *for Defendants in Error*.

Mr. Justice BRADLEY delivered the opinion of the court.

The defendants in error brought their action in the Circuit Court for the District of Louisiana for the sum of twelve thousand dollars, the value of brig Sailor Boy, lost at sea, and which was insured, as they allege, by the plaintiffs in error.

Plaintiffs below filed with their petition two policies of insurance on said vessel, the second of which was issued as a renewal of the original insurance, and the petitioner sets forth that though the second or renewal policy is dated the 15th day of January, A. D. 1870, it insures the vessel from the date of the expiration of the first policy, namely, from the 1st day of January, A. D. 1870, and was issued by reason of a verbal contract or agreement to renew made on the 31st of December, 1869.

On the trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium for insurance, knew that the vessel was lost, and that the defendants had no such knowledge or information.

It is obvious from this statement that no action could be sustained on the policy, and that in point of fact the taking of such a policy, and causing the defendants to sign it under such circumstances, was a fraud.

To avoid the consequences of this nullity of the written instrument, plaintiffs rely upon the fact that the execution of the policy was but carrying into effect an agreement made before the loss of the vessel.

The plaintiffs offered in evidence the deposition of their agent, which gave an account of conversations had by him in reference to a renewal of the insurance with some one in the defendants' office. The

defendants objected to this testimony, on the ground that there was a written contract of insurance between the parties for the same amount of insurance, for the same amount of premium, on the same object insured, the vessel called *Sailor Boy*, by the same plaintiffs as insured, and defendants as insurers, for the same space of time, to wit, from the 1st day of January, 1871, to the 31st of March, 1871; that the plaintiffs had no right to contradict *this* written application aforesaid by proof of a previous verbal contract; that the plaintiffs' right of action, if any, was upon the written application and contract aforesaid, and that they could not ignore the said written contract to fall back on an alleged previous verbal contract of the same tenor and purport; that the evidence showing that when said written contract was executed the plaintiffs and their agents were aware of the fact of the previous loss and abandonment of the *Sailor Boy*, said written application and policy were not binding in law, but were nevertheless the contract of the parties, subject to be gainsaid by proper allegations and proof of fraud; that plaintiffs could not ignore the written contract.

But the court ruled as follows: The plaintiffs put their entire case upon a verbal contract to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that when they sent for the written policy on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue, and overruled the objection and admitted the testimony.

Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery, as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract; and must have the same effect in excluding parol testimony in its application to it, that other written instruments have.

Counsel for defendants in error here relies on two propositions, namely, that the policy, though executed January 1st, is really but the expression of verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does

not invalidate the contract, though known to the insured and kept secret from the insurers ; and secondly, that they can abandon the written contract altogether and recover on the parol contract.

We do not think that either of these propositions is sound.

Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company.

When the company came to make this instrument, they were entitled to the information which plaintiffs had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question would have been raised of the validity of the instrument or of fraud practiced by the insured.

On the other hand, if they had refused to make a policy, no injury would have been done plaintiffs, and they would then have stood on their parol contract if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

To permit plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered, and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

We think it equally clear, that the terms of the contract having been reduced to writing—signed by one party and accepted by the other at the time the premium of insurance was paid—neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement. And it is hardly necessary to say that the party who has destroyed the validity of that contract by his own fraud, cannot for *that reason* treat it as if it had never been made, and recover on the verbal statements made before its execution.

We may add that as the only testimony offered to prove this parol contract was the deposition of a single witness, made part of the bill of exceptions, we do not see in that deposition sufficient evidence of a completed contract, of an agreement assented to by both parties at

any one time, to be submitted to a jury, even if the written contract had never been executed.

The judgment of the Circuit Court is, therefore, reversed, with directions to grant a new trial.

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## SUPREME COURT OF INDIANA,

NOVEMBER TERM, 1872.

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*Appeal from Marion Circuit Court.*

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LOUIS RABER, *Appellant*,

vs.

JOHN PAUL JONES ET AL., *Appellees.\**

The insurance company, of which the appellees were directors, issued a policy to the appellant upon his barn, which was afterward destroyed by fire. The company adjusted the loss and gave the appellant a note for \$1,000.00, the amount of the loss, and received from him a written receipt, discharging the company from all further claims on account of the fire. This note the company afterward took up, paying part of the amount in cash, and giving a new note for the remainder, upon which the appellant afterwards brought suit and recovered a judgment. The directors failed to satisfy the execution issued upon the judgment, or to make an assessment.

The statute relating to insurance companies provided that "whenever sufficient goods or estate of any such corporation cannot be found to satisfy an execution issued against them upon a judgment recovered on a policy by them made, and the said corporation have goods or estate to satisfy such execution, and the directors shall neglect or refuse to pay the same, or if the directors shall for thirty days after the rendition of such judgment refuse or neglect to make such an assessment as they may be authorized to make therefor, and to deliver the same to the treasurer for collection, or fail to apply such assessment, when collected, toward satisfying such execution, then, in either of the cases aforesaid, the directors shall be personally liable for the whole amount of such execution."

*Held*, that this is in the nature of a penal statute, inflicting upon the directors the penalty of a personal liability for a failure to pay the execution, or to make and properly apply the assessment. It must therefore be construed with some degree of strictness, and cannot be extended beyond the cases fairly within its terms, in order to meet those that might be conceived to be within the spirit and object of the law.

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\* Decision rendered February 7th, 1873.

The Legislature provided the personal remedy against the directors only in cases where there has been a judgment against the corporation on a policy, and the court cannot extend the remedy to cases where a judgment has been recovered on something else than a policy.

The complaint in this case does not aver that the judgment against the corporation was recovered upon the policy. The plaintiff therefore is not entitled to the remedy provided against the directors.

It is a clear principle of pleading that in declaring upon a statute the averments must be sufficient to bring the case within the statute.

The arrest of judgment ends the case, and no judgment for the defendant should have followed. Order for arrest of judgment affirmed.

LUCIAN BARBOUR AND CHAR. P. JACOBS, *for Appellant.*

JOHN T. DYE AND A. C. HARRIS, *for Appellees.*

WORDEN, J.

Complaint by the appellant against the appellees, alleging the following facts: That the defendants were on the 6th day of February, 1867, and for more than thirty days thereafter, the Board of Directors of the Farmers and Merchants Insurance Company, of Indianapolis, a corporation organized in pursuance of a statute of the State of Indiana, entitled, "An Act for the incorporation of Insurance Companies, defining their powers and prescribing their duties," approved June 15th, 1852, and doing business in the County of Marion and State of Indiana. That on the — day of —, 1865, the said insurance company became indebted to the plaintiff in the sum of one thousand dollars, being the amount of loss incurred by him in the destruction of a barn by fire, in the month of September, 1865, which barn was insured against loss by fire by the said company by a policy of insurance signed by the president and secretary of said company in the sum of eleven hundred dollars.

That thereafter, in the year 1865, the said insurance company, by its authorized agent, adjusted said loss of the plaintiff and fixed the amount thereof at one thousand dollars, a portion of which amount, to wit: three hundred and fifty dollars, was afterwards paid by said insurance company to the plaintiff, and for the residue of the claim, with the interest thereon, to wit: the sum of \$700.15, the plaintiff recovered a judgment against the said company in the Court of Common Pleas of Marion County, in the State of Indiana, on the 16th of February, 1867. That said company neither at the time the judgment was rendered, nor at any time thereafter, had any goods or assets, except their premium notes and claims due the company where-with to satisfy said judgment, or any execution that might be issued

thereon. That the defendants, being the Board of Directors of said company, neglected and refused to make any assessments as they were authorized to do, and deliver the same to the treasurer of said company, for more than thirty days after the date of the rendition of said judgment. That any assessment that may have been made afterward by said Board of Directors was never delivered to the treasurer for collection, and that no part of any collections that may have been made after the rendition of the judgment was ever applied toward the satisfaction of said judgment or any execution issued thereon. That on the 5th of April, 1867, the plaintiff caused an execution to be issued upon the judgment to the sheriff of the county, who, having demanded property and having made search therefor, the defendant gave up no property to be taken on execution, and the sheriff found none within the county; and on the 14th day of August, 1867, the sheriff returned the execution indorsed, "No property found whereon to levy." That the said Board of Directors never paid any part of the judgment or the execution issued thereon, by the application of any money or property of the company, or any part of the proceeds of any assessment made by them. That the judgment remains due and unpaid. By means whereof, etc.

The defendants answered by general denial, and the cause was submitted to a jury for trial, who returned a general verdict for the plaintiff, and the following answers to interrogatories propounded to them:

Plaintiff's interrogatories:

1st. "Did not the plaintiff sustain a loss by fire in the burning of his barn, hay and grain, to the amount of two thousand dollars, which had been insured against in the Farmers and Merchants Insurance Company, of Indianapolis, by policy number 1,071?" Answer—"Yes." 2nd. "Did not the said insurance company, on the 10th of December, 1865, adjust said loss with the plaintiff and give him in settlement thereof the note of the company for \$1,000.00?" Answer—"Yes." 3rd. "Did they not afterward take up said note and give him part cash therefor and a new note payable to C. G. Dirlam, their agent, and by said agent indorsed to the plaintiff for the balance, to wit: \$660.45?" Answer—"Yes." 4th. "Did not the plaintiff recover judgment against said Farmers and Merchants Insurance Company in the Common Pleas Court of Marion County, Indiana, on the 6th of February, 1867, for \$700.15 and costs on said last note?" Answer—"Yes." 5th. "Is not such judgment still unpaid?" Answer—"Yes." 6th. "Were not defendants directors of said insurance company at the time said judgment was rendered, and for sixty



days thereafter?" Answer—"Yes." 7th. Did they make any assessment to pay said judgment within thirty days after its rendition?" Answer—"No." 8th. "Did not an execution issue on such judgment on the 5th of April, 1867, and come to the hands of the sheriff of Marion County, and did he not return the same with the following indorsement thereon: 'Came to hand April 5th, 1867, at three o'clock, P.M., and I find no goods or chattels, lands or tenements, whereon to levy. August 14th, 1867. George W. Parker, sheriff M. C., by Joel Elliott, dep'y?'" Answer—"Yes." 9th. "Did the plaintiff execute the written receipt offered in evidence, upon the understanding that the company's note given for his loss by fire would be paid, and not in satisfaction of his claim against the company?" Answer—"Yes." 10th. "Did not the company, long after the execution of the receipt, and pretended release, admit this liability to plaintiff for his loss by fire under their contract of insurance?" Answer—"Yes."

Defendants' interrogatories:

1st. "Did not the destruction of Raber's barn, alleged in the complaint, occur in 1865?" Answer—"Yes." 5th. "Did not said company have more than \$750.00 worth of personal property in Marion County, besides their premium notes, on the 6th day of February, 1867, and for more than thirty days thereafter; if not, how much did the company have?" Answer—"Yes." 6th. "Was not the note upon which the judgment set forth in the complaint was rendered a note dated June 28th, 1866, payable one day after date to Charles G. Dirlam, and by him assigned to Louis Raber?" Answer—"Yes." 7th. "Did not Louis Raber accept a note from said company, dated December 8th, 1865, payable March 1st, 1866, for his loss, and on said 8th day of December, 1865, execute a writing containing the following stipulation: 'And the said company is hereby discharged from all further claims on account of said fire?'" Answer—"Yes."

The jury being unable to agree upon answers to the second, third and fourth interrogatories propounded by the defendants, were discharged without returning any answers thereto.

The defendants moved for a *venire de novo* on this ground, but the motion was overruled, because, we infer, the objection was not made before the jury was discharged. The plaintiff moved for judgment in his favor on the verdict and answers of the jury, but the motion was overruled and he excepted. The defendants moved in arrest of judgment, because the complaint did not state facts sufficient to constitute a cause of action, and this motion was sustained and the

plaintiff excepted. Judgment was then rendered that the plaintiff take nothing by his writ and that the defendants recover of him their costs, etc. Exceptions.

The 48th section of the statute mentioned in the complaint, (1 G. & H., 396,) provides that "whenever sufficient goods or estate of any such corporation cannot be found to satisfy an execution issued against them upon a judgment recovered on a policy by them made, and the said corporation have goods or estate to satisfy such execution, and the directors shall neglect or refuse to pay the same, or if the directors shall for thirty days after the rendition of such judgment refuse or neglect to make such an assessment as they may be authorized to make therefor, and to deliver the same to the treasurer for collection, or fail to apply such assessment when collected, toward satisfying such execution, then, in either of the cases aforesaid, the directors shall be personally liable for the whole amount of said execution."

The statute quoted, it will be seen, makes the directors liable personally, in the cases therein provided for, only when there has been a judgment recovered on a policy made by the corporation.

This is in the nature of a penal statute, inflicting upon the directors the penalty of personal liability for a failure to pay the execution in the case provided for, or to make and properly apply an assessment as provided for. It must therefore be construed with some degree of strictness, and cannot be extended beyond the cases fairly within its terms, in order to meet those that might be conceived to be within the spirit and object of the law. The Legislature has provided the personal remedy against the directors only in cases where there has been a judgment against the corporation on a policy, and the courts cannot extend the remedy to cases where a judgment has been recovered on something else than a policy. To do so would be virtually creating a new statute, under the color of construing the one enacted by the Legislature.

The answers of the jury to the interrogatories render it entirely clear that the judgment against the company, mentioned in the complaint, was rendered upon a note, and not upon a policy. If the claim of the plaintiff against the corporation *on the policy* was released or extinguished by the taking of the note and the execution of the discharge mentioned in the 7th interrogatory propounded by the defendants, although upon the "understanding" mentioned in the plaintiff's 9th interrogatory, his right of action on the policy was gone, and his sole remedy against the corporation was upon the note.

If, on the other hand, his claim on the policy was not released or extinguished, and if he might still have brought his action upon the policy, he elected not to do so, but chose to bring it upon the note. He therefore does not bring his case within the terms of the statute, and is not entitled to the remedy provided against the directors.

The complaint does not aver that the judgment against the corporation was recovered upon the policy.

It is a clear principle of pleading that in declaring upon a statute the averments must be sufficient to bring the case within the statute. The complaint was therefore radically defective in not stating facts sufficient to constitute a cause of action, and the court properly arrested the judgment. When the judgment was arrested, however, there should have been an end of the case. No judgment for the defendant should have followed. The arrest of judgment ends the case. Each party pays his own costs, and the plaintiff is at liberty to proceed *de novo* in a fresh action. Black. Com., vol. iii., p. 394 n.

The order below arresting the judgment is affirmed, but the subsequent judgment is reversed with costs, and the cause remanded with instructions to the court below to strike the case from the docket.

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## UNITED STATES CIRCUIT COURT,

### EASTERN DISTRICT OF MISSOURI

MARCH TERM, 1873.

JAMES MURRIN, *Petitioner*,

*In the Matter of*

BOLIVAR OWEN AND JAMES MURRIN, *Bankrupt.\** }

The wife of the petitioner, being possessed of a separate estate, secured to her by an ante-nuptial marriage settlement, in the year 1869 took out two policies upon her life, payable, on her death, to husband. She paid three annual premiums out of her own estate, and died in January, 1872, before the premium for that year became due.

In November, 1869, after the insurance was effected, the petitioner was adjudged a bankrupt. After the death of the wife, supposing he had no legal claim to the insurance, on the demand of the assignee in bankruptcy, he gave him an

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\* Decision rendered April 2nd, 1873.

order for the proceeds of the policies, which were paid over to him. The petitioner asks that the amount of said insurance may be paid over by the assignee to him.

The payment of the last premiums by the wife proceeded purely from her bounty, and her object in making the payments, in virtue of which the policy was kept in *esse*, must have been to make provision for her husband.

The husband at the time of the bankruptcy had no such interest in the policies as gave the assignee the right to retain their proceeds, as against the manifest intention and purpose of the wife.

The policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy under such a contract, should, by relation back to the time of commencement of proceedings in bankruptcy, be held to belong to the assignee. Order of the District Court granting the petition affirmed.

This cause is brought here to revise an order of the District Court for the Eastern District of Missouri, overruling the demurrer of the assignee in bankruptcy to the petition of James Murrin, one of the bankrupts, and directing the assignee to pay the bankrupt Murrin the proceeds in his hands of two policies of life insurance, less the sum paid by him for costs and expenses of collection.

The petition thus demurred to is as follows :

To the Hon. SAMUEL TREAT, judge of said court : The petition of James Murrin, one of the said bankrupts, respectfully represents, That a petition in bankruptcy against your petitioner and said Bolivar Owen, was filed in this court on the 30th day of November, 1869. That a hearing was had and an adjudication of bankruptcy entered on said petition on December 10th, 1869. That on December 28th, 1869, your petitioner and said Owen filed their schedules as required by law. That on January 18th, 1870, Charles Green was elected and appointed assignee in bankruptcy of said Owen and Murrin, as partners and individually. That Sarah E. B. Murrin was the wife of your petitioner, James Murrin, and that by a marriage settlement made previous to their intermarriage, all the property and estate of said Sarah was settled and secured to her own separate use and behoof, so that the said James had no right or interest therein, nor title nor claim thereto, nor to any portion thereof. That said separate estate was large in amount and of great value. That on March 17th, 1869, the said Sarah made application to the Penn Mutual Life Insurance Company, doing business in this State, for an insurance upon her own life in the sum of five thousand dollars, *payable upon her death, upon proper proof, to her husband, the said James Murrin*. That upon said application said company issued to said Sarah a policy of insurance upon her life, in consideration of the payment by her of the annual premium of one hundred seventy-seven fifty hundredths

dollars, payable one half in cash and one half by note bearing interest at six per cent., payable in advance, on or before the 26th of April in each year during the continuance of the policy. That said Sarah *out of her own funds* paid the premiums required in cash, and also the interest upon the notes for the years 1869, 1870, 1871 in advance. That the said Sarah *died* on the 19th day of January, 1872. That your petitioner did not pay any of said premium sums, nor were the same paid out of any funds or property in which he had any interest, legal or equitable, nor did he suppose that he had interest or title to said policies either legal or equitable which could pass to his assignees in bankruptcy, and for this reason he did not enter said policy in his schedule of assets belonging to him at the date of the petition filed in this court. That after the death of the said Sarah and the money due on said policy became payable, the said Green, assignee in bankruptcy of your petitioner and said Owen, applied to your petitioner, and required him to set over said policy and the sum secured thereby to him as assignee ; and your petitioner, supposing that said demand was legal, did give to said Green an order for the payment of the sum due upon said policy as follows : " Policy No. 9,199, on life of Sarah E. B. Murrin. I, James Murrin, the person in whose favor the above policy was issued, make no claim for the sum thereby insured, or any part thereof or any interest therein, and do request and direct the Penn Mutual Life Insurance Company to pay the same to Charles Green, my assignee in bankruptcy, who is entitled to the amount. Witness my hand and seal the 7th day of May, 1872. James Murrin, [seal.] And the said Green, as assignee by suit at law in the St. Louis Circuit Court, recovered judgment against such company on December 11th, 1872, and said judgment for the sum of \$4,933.05 was duly satisfied and paid to said Green on the 26th day of December, 1872."

Precisely the same allegations are made in respect to another policy issued to the said Sarah by the Connecticut Life Insurance Company on the 29th day of April, 1869, for the sum of \$5,000.00, payable at her death, to the petitioner, her husband, upon which the said Green, as assignee, collected May 11th, 1872, the sum of \$4,948.57. The petition then continues : " Your petitioner farther represents, That the orders for collection of the amounts due upon said policy were without consideration. That your petitioner had no title or interest legal or equitable in said policies on the 30th of November, 1869, the date of the filing of the petition in bankruptcy, which could pass to his assignee by virtue of the act of Congress to estab-

lish a uniform system of bankruptcy throughout the United States, and he is informed by counsel and believes that the sums of money collected by said Green upon said policies belong to your petitioner and to his creditors, becoming such since the filing of said petition in bankruptcy. In consideration of the premises, he prays that said Charles Green, as assignee, may be made to pay over to your petitioner the said sums of \$4,933.05 and \$4,948.57, less the costs, charges and expenses by him incurred in collecting the same, and that your petitioner may have such other and farther relief as to the court may seem meet."

C. C. WHITTELEY, *for Petitioner*

LACKLAND, MARTIN AND LACKLAND, *for Assignee (Appellant.)*

DILLON, C. J.

The wife of the petitioner being possessed of a separate estate, secured to her by an ante-nuptial marriage settlement, applied in the spring of 1869 for two policies of insurance of \$5,000.00 each upon her life, *payable upon her death to her husband*. They were issued accordingly, and she paid the premium for one year, one half in cash and one half by note. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premiums for the two following years, 1870 and 1871, and before the next premium fell due she died. The question is whether the assignee as against the bankrupt is entitled, for the benefit of the estate, to the proceeds of the policies. The assignee does not claim that his right is strengthened by reason of having obtained, in the manner stated, the actual possession of the proceeds, and the only contest is as to the respective legal or equitable right of the assignee and bankrupt thereto.

Counsel on both sides in their well-considered briefs have argued many points which, though pertaining to the general subject of life policies for the benefit of another, are, nevertheless, not necessarily involved in the decision of the case.

The counsel for the assignee claims that at the date of the bankruptcy of the husband, November 30th, 1869, the husband had a right of property in the policy, (which it is contended is a *chose in action*,) of such a nature that it vested in the assignee by virtue of adjudication in bankruptcy. (Bankrupt Act, Sec. 14.) Under this section, property and rights which are acquired by the bankrupt after the commencement of the proceedings in bankruptcy do not vest in

the assignee ; and to make good his claim, the assignee must show that the right to the benefit of the policy was one which not only existed in the husband at the time he was proceeded against in bankruptcy, but is one of such a nature as to vest in the assignee as of that time by virtue of the provisions of the bankrupt act. This act should receive such a construction as accords with its well-known purpose, which is, that if an insolvent debtor will surrender all his property (not exempt) for distribution among his creditors, he may on the terms provided in the act have his discharge. If the wife's death had happened before the bankruptcy, there being no statute protecting the husband's rights under the policy, the right to collect and hold the money would, it may be admitted, pass to the assignee. But her death did not happen until over two years afterward, during which time the wife continued to pay the premiums. It is admitted that she could not have been compelled to pay them, either by the husband or by the assignee. Her payment of them proceeded purely from her bounty. It is certain to a practical intent that if she had not paid the subsequent premiums, the first payment, made before the bankruptcy, would have been of no benefit either to the assignee or to the husband, for she did not die during the year. It is also certain to a practical intent that had the last premium not been paid, there would have been no proceeds here about which to litigate. Her intention, her object in making these payments, in virtue of which the policy was kept *in esse*, must have been to make provision for her husband ; and what equity, let me ask, have creditors, or the assignee representing them, to thwart the purpose which she had in view and for which she paid *her* money—money to which they had no claim ? The assignee, if it be conceded that he could have done so for the benefit of the estate, which I do not admit nor decide, took no steps to pay the premiums, but asks the benefit of those paid by the wife. It is inconceivable that she made or intended to make the payments for the benefit of the assignee, and she doubtless died in the confident belief that she had made provision for her husband.

Without discussing the questions which have been argued at the bar as to the nature and extent, before the death occurs, of the interest a person designated by the bounty of another as the one to whom a policy is ultimately to be paid, I am quite confident that the husband at the time of his bankruptcy had no such interest in these policies as to give the assignee the right to retain their proceeds as against the manifest intention and purpose of the wife. Could the assignee as against the wish of the wife have said, "I demand the

policy, and intend to keep up the premiums for the benefit of the estate?" If it were necessary to answer this question it would seem that he would have no such right; and that she could properly say: "This is a matter of my own, a provision originating in my bounty, one upon which my husband's creditors have no claim, and with which they have no right to interfere." But the assignee took no such steps; on the contrary, he allowed, or did not prevent the wife from making the payments which kept the policy alive; and I rest my judgment against him on the broad ground that under the circumstances of the case, the creditors, for whose benefit the money is sought, have not the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them. The policy was kept up by her for the benefit of her husband after her death, not for the benefit of his creditors before his bankruptcy. The district judge, in deciding the case, seized the considerations which control it, when he remarked: "Looking at the nature of the contract for the insurance as being a provision by one married party for the benefit of another, and kept in force by the wife out of her separate estate, without any step being taken by the assignee, her equities should be carefully regarded. The policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy under such a contract, should by relation back to the time of commencement of proceedings in bankruptcy, be held to belong to the assignee. The design of such charitable acts for the benefit of a third person was not intended to be defeated by the bankrupt law, in a case like the present, where such a result would be against all equity."

**Affirmed.**



## SUPREME COURT OF MISSOURI,

MARCH TERM, 1873.

*Appeal from St. Louis Circuit Court.*

THE WASHINGTON MUTUAL FIRE INS. CO.,	}
OF ST. LOUIS, <i>Respondent</i> ,	
us.	
ST. MARY'S SEMINARY, <i>Appellant</i> .*	

The plaintiff issued a policy upon the property of the defendant, and received a premium note signed "Daniel McCarthy, prest, per Thos. Burke." The application was designated in itself as, "Application of Daniel McCarthy, President of St. Mary's Seminary." The number and date of the application, premium note and policy were the same. The note referred to value received in the policy, and the policy referred to the execution of the note.

The seminary, by its charter, was placed in charge of three officers, "Superior," "Assistant Superior," and "Procurator." At the time the insurance was obtained McCarthy was the procurator and acting superior, and the evidence tended to show that he had authorized Burke to apply for the insurance, sign the note, transmit the policy and pay assessments.

If there was any ambiguity in the note or policy, parol evidence was admissible for the purpose of affording an explanation thereof, and of showing upon whom the liability, arising from the execution of the note, should rest, and for whose benefit the policy was designed to insure.

The result is to all intents and purposes the same as if the note, policy and application had all been written upon one and the same sheet of paper.

Burke was fully empowered to give the note and effect the insurance for the defendant, and McCarthy had full power to authorize him to act as he did. No proof of special authority to Burke was required. The doctrine has long since been justly exploded that every act to be performed by the agent of a corporation must be authenticated by its corporate seal.

The term Superior was tantamount to that of President, and meant the same thing. Where a person holds high official relations to a corporation, and exercises the powers and engages in the performance of the duties usually incident to such official position, it matters little whether he is called superior or president. Judgment affirmed.

WM. H. HORNER, *for Respondent*.

DANIEL DILLON, *for Appellant*.

\* Decision rendered May 7th, 1873.

SHERWOOD, J.

Action in the St. Louis Circuit Court by the Washington Mutual Fire Insurance Company to recover from St. Mary's Seminary a certain sum for assessments made by the former on a premium or deposit note, which the defendant was in the petition charged with having executed.

The answer was a general as well as a very lengthy and specific denial of each and every allegation which the petition contained. It denied ever having made any application to plaintiff for insurance ; denied that any application of defendant to plaintiff for insurance was signed by Daniel McCarthy, president of defendant, per Thomas Burke, the agent of defendant ; denied the delivery by plaintiff to defendant of its policy of insurance ; denied the execution by defendant to plaintiff of its certain premium or deposit note mentioned in the petition ; denied that any note executed by defendant was filed with the petition ; denied that any note executed or delivered by defendant to plaintiff was signed by Daniel McCarthy, president, per Thomas Burke ; denied that McCarthy and Burke were authorized agents of defendant to make any such application or to execute any premium note, etc.

The note mentioned in, and filed with the petition, is in this form :

\$750.00. For value received, in policy No. 2,969, dated the 14th day of March, 1866, issued by the Washington Mutual Fire Insurance Company, of St. Louis, I promise to pay said company or their secretary, for the time being, the sum of \$750.00, in such portions and at such time or times as the directors of said company may, agreeably to their acts of incorporation, require.

DANIEL MCCARTHY, *Pres't*,

Per Thos. Burke.

And indorsed on said note are these words :

No. 2,969.....	\$750
Received 10 per centum.....	75, and
Received assessment No. 5 .....	75

The trial was had before the court ; a jury being waived.

The application mentioned in and annexed to the petition, was designated in said application as "Application of Daniel McCarthy, President of St. Mary's Seminary," and was signed in the same man-

ner as the premium note above referred to. The policy of insurance was of the same date and number as the note and application, (both of which are referred to in the policy,) and purports to insure Mr. Daniel McCarthy, president of St. Mary's Seminary, against loss or damage by fire to the amount of \$5,000.00, as follows, viz.:

On the brick seminary building.....	\$2,500
On the stone church building.....	2,500
	<hr/> \$5,000

Situated in Perry County, Missouri, near Perryville—\$22,500.00 on seminary, and \$12,500.00 on church, insured elsewhere.

The evidence showed that by the terms of the charter of defendant, it was placed in charge of three officers: "Superior, Assistant Superior, and Procurator." That at the time the note above mentioned was signed by Thomas Burke, Daniel McCarthy was the incumbent of these offices: Procurator or treasurer, and acting superior or president. And the evidence, although conflicting, tended very strongly to show that Daniel McCarthy, either by acts of antecedent authorization or else of subsequent recognition, had empowered Burke to make the application for insurance, sign the note in the way it was signed, procure and transmit the policy and pay assessments.

Defendant objected to the introduction of both the note and policy in evidence, on the ground that the former was not and did not purport to be the note of the defendant, and that the latter was not and did not purport to be a policy issued to or insuring defendant. The court allowed both note and policy to be read in evidence, and defendant excepted.

The court, at the instance of plaintiff, gave the following instructions:

1. If the court believes from the evidence that defendant, through its president or superior, recognized the note sued on as the note of the defendant, by paying a portion thereof after demand upon defendant, by notice to president or superior, and that a portion of said note is now due, the court will find for the plaintiff.

2. The court declares the law to be that the act of a person for another, acting as his agent, may be valid and binding upon the principal on account of the ratification or adoption of the agent's act after knowledge by the principal of what the person acting as agent has done—a subsequent ratification has a retrospective effect, and is equivalent to a prior command.

And at defendant's request gave instructions as follows :

1. The court declares the law to be that Daniel McCarthy had no authority to bind defendant by the contract of insurance offered in evidence, or the note sued on, from the fact that he held the office of president of defendant, and plaintiff, in order to recover in this action, must prove that said McCarthy had authority from defendant to execute said note by evidence other than that said McCarthy held said office of president of defendant.

2. The court declares the law to be that any instruction given by Stephen Ryan to Father Burke in reference to effecting insurance are not binding upon defendant.

3. The court declares the law to be that if Thomas Burke, at the time he made the contract of insurance given in evidence, and executed the note sued on, acted by the agent of Daniel McCarthy, and not as agent of the defendant, then no subsequent action of defendant could ratify said contract or the execution of said note, or make them binding upon defendant.

4. The court declares the law to be that the fact that Daniel McCarthy had authority to bind defendant by a contract of insurance such as the one given in evidence, and by the execution of such a note as the one sued on, did not authorize him to delegate that authority to Thomas Burke, and plaintiff to recover in his action must prove, by evidence other than the fact that he himself possessed such authority, the power of said McCarthy to delegate said authority to said Burke.

And these instructions the court refused, viz :

1. The court declares the law to be that on the evidence plaintiff cannot recover.

2. The court declares the law to be that a simple authority from defendant to Daniel McCarthy to effect insurance for defendant would not authorize said McCarthy to bind defendant by contract of insurance given in evidence, or to the note sued on, and the plaintiff in order to recover must prove a special authority to make such a contract of insurance, and to give such a note or a ratification of said contract and of the execution of said note by defendant.

3. The court declares the law to be that the paying of premium money on the policy given in evidence, and of assessments on the note given in evidence, out of money in his hands, belonging to defendant, by Thomas Burke, without authority so to do, and which payments defendant never assented to, was not a ratification by defendant of the contract of insurance read in evidence, or of the exe-

cution of said note, notwithstanding defendant accepted said Burke's account with defendant, crediting himself with money repaid, and took no step to recover such money.

4. The court declares the law to be that the law does not authorize and has not at any time authorized any such officer of defendant as president, and no action of any person pretending to be such officer is binding upon defendant in consequence of his assuming to act as such officer.

Defendant excepted to the giving of the instructions for plaintiff, and to the refusal of the court to give the last series of instructions asked by defendant.

Judgment was rendered for plaintiff, and after unsuccessful motions for a new trial and in arrest, the cause was taken to General Term, where the judgment of Special Term being affirmed, the case comes here by appeal.

If there was any ambiguity in either the note or the policy of insurance, parol evidence was perfectly admissible for the purpose of affording an explanation thereof, and of showing upon whom the liability arising from the execution of the note should rest, and for whose benefit the policy was designed to inure. In *Mechanics' Bank of Alexandria, vs. Bank of Columbia, 5 Wheat., 327*, which was an action of assumpsit on the following check :

*Mechanics' Bank of Alexandria, June 25, 1817.*

Cashier of the Bank of Columbia : Pay to the order of P. H. Minor, Esq., \$10,000.00.

WM. PATTON, Jr.

The court says : "It is by no means true, as was contended in argument, that the acts of agents derive their validity *from professing on the face of them* to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts, first, that the act was done in the exercise, and second, within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury ; and this inquiry is not confined to written instruments, (to which alone the principle contended for could apply,) but to any act, with or without writing, within the scope of the power or confidence reposed in the agent." In that case it was contended that as the check on its

face purported to be the private check of Patton, no extrinsic evidence could be received to prove the contrary. And in reference to that, the court further says: "The only ground upon which it can be contended that this check was the private check, is that it had not below the name the letters Cas. or Ca. But the fallacy of the proposition will at once appear from the consideration that the consequences that all Patton's checks must have been adjudged private, for no definite meaning could be attached to the addition of those letters without the aid of parol testimony."

The case of the Commercial Bank vs. French, 21 Pick., 486, was a suit upon a note made payable to the "Cashier of the Commercial Bank," and it was contended that the suit should have been brought in the name of the person then cashier, and would not lie in the name of the corporation. But the court there says: "So a contract with the stockholders or with the president and directors, or with the directors of the Commercial Bank, would doubtless be, in its legal effects, a contract with the corporation. It is not easy to perceive why a contract with the cashier of a bank is not a contract with the bank itself. \* \* \* The principle is that the promise must be understood according to the intention of the parties. If, in truth, it be an undertaking to the corporation whether a right or a wrong name, whether the name of the corporation or of some of its officers be used, it should be declared on and treated as a promise to the corporation."

The above cases are in full accord with the decisions of our own State; that of Mechanics' Bank vs. Bank of Columbia, 5 Wheat., 327, being cited with approval by Judge Ewing in Smith vs. Alexander, 31 Mo., 193, (see, also, to the same effect, Schuetze vs. Bailey, 40 Mo., 69; Musser vs. Johnson, 42 Mo., 74; McClellan vs. Reynolds, 49 Mo., 312.)

In the present case, the note sued on is signed "Daniel McCarthy, Pres't." But president of what? Just here under the rule as laid down in the above-cited cases, parol evidence steps in and affords a ready and satisfactory explanation.

The abbreviated word, "Pres't," attached to the name of Daniel McCarthy, is an ear-mark of the official capacity in which the note was signed—not evidence, it is true, that the note was signed in that capacity—but a sufficient basis for the introduction of testimony tending to establish that fact.

I have hitherto treated this case just as if the note sued on were standing alone, and explanatory oral evidence were offered in regard to the above alluded to abbreviation.

But this record presents a far stronger case than if the note stood by itself. Here the note is numbered 2,969—so is the policy—and both are of even date. The note says, “for value received in policy 2,969,” and the policy recites the execution of the note, “for the sum of seven hundred and fifty dollars, being the amount of deposit or premium for insurance as above said,” thus keeping up, as it were, between the policy and the note a reciprocal cross-fire of references, and establishing beyond peradventure the design with which the note was executed, on whom the burden of its payment was intended to be cast, and for whose benefit the policy was meant to inure. To all intents and purposes, therefore, the result is precisely the same as if note, policy and application were all written upon one and the same sheet of paper. To hold otherwise would be to entirely ignore the familiar rule always applicable when one instrument makes reference to another.

McCarthy's authority to act in the premises is to be presumed from the high official position which he held, being, as the evidence shows, at the time of the transaction put in issue by the pleadings, superior or president, and procurator or treasurer of defendant ; from the fact the policy of insurance was sent to him ; from the fact that after notice of assessment was sent to him at Perryville, as president of defendant, that response was made through Burke and that assessment paid ; from the fact that McCarthy had in his possession the policy in question, together with others purporting to have been made in the same way and at the same time, and “authorized” a lawyer whom he consulted for the purpose if they “were not legal to have them made legal ;” from the fact that Burke, the former procurator or treasurer of defendant, out of the money in his hands, paid to him by the patrons of defendant, had made disbursements for assessments and sent memoranda thereof to McCarthy once or twice a year, for several years, as McCarthy himself swears.

These facts, and many others of like sort, pointing in the same direction, leave no doubt in the mind that Burke, either by prior appointment or subsequent sanction from McCarthy, was fully empowered to give the note and effect the insurance for defendant, which gave rise to this suit ; and that McCarthy had full power to authorize Burke to act as he did. No proof of any special authority was required. The doctrine has long since been justly exploded that every act to be performed by the agent of a corporation had to be authenticated by its corporate seal.

Thus, in the *Union Manufacturing Company vs. Pitkin*, 14 Conn., 174, speaking with reference to this point, the court says:

"But it is said that no act or vote of the corporation is shown, nor is there any witness to the fact that this was done by the corporation, or by its authority. It is now quite too late to question the acts of a corporation because a vote and seal are not shown, since the decisions in our own courts and the courts of the United States." (See, also, *Western Bank of Missouri vs. Gitstrap*, 45 Mo., 419.) It is the merest play upon words to assert, as was done in one of the refused declarations of law asked by appellant, that the law did not authorize any such officer of defendant as "president."

The testimony of McCarthy himself shows that the term Superior was tantamount to that of President, and meant the same thing.

Once establish the fact, as the evidence amply does in this case, that a given person holds certain high official relations toward a corporation, and is in the active exercise, for a series of years, of power, and engaged in the performance of duties usually incident to such official position, and it matters little whether he is called superior or president.

The first, second and fourth declarations of law which the court refused to give for defendant were properly refused, as shown above. The defendant's third declaration was properly refused also, as it assumed the existence of two facts—first, that Burke made the payments "without authority so to do," and second, that defendant "never assented to" such payments. There are also minor exceptions in this record, which have either been incidentally passed upon in the foregoing remarks, or which, although considered, are not regarded as possessing sufficient practical importance to merit specific mention.

As the result of the views herein expressed, there is no error in the record, and the judgment will accordingly be affirmed.

Judge Wagner absent. The other judges concur.



## UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

*In Error to the Circuit Court of the United States for the Western  
District of Michigan.*

DELITE P. RIPLEY, ADM'X, AND JAMES SUTHERLAND,  
ADM'R, OF THE ESTATE OF WILLIS J. RIPLEY, DECEASED, *Pl'ffs in Error*,

vs.

THE RAILWAY PASSENGER ASSUR. Co., OF HARTFORD, CONN.\*

The defendant by its policy agreed to pay the legal representatives of the assured the sum of \$5,000.00 in the event of his death from violent and accidental means, provided his death was caused by an accident while he was traveling by public or private conveyance.

The assured, in returning from abroad, proceeded by steamboat to a village about eight miles from his residence, from which place he started to walk home, and on the way received injuries by violence, from the effects of which he died soon afterwards.

The contract must receive the construction which the language used fairly warrants. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the assured was not, when injured, traveling within the terms of the policy. There is nothing to show that it was not. Judgment affirmed.

GEORGE GRAY, Esq., Washington, D. C., *for Plaintiffs in Error.*

HENRY C. ROBINSON, Esq., Hartford, Conn., *for Defendant in Error.*

Mr. Chief Justice CHASE delivered the opinion of the court.

The suit below was originally brought in the Circuit Court for Kent County, Michigan, by the administrators of Willis J. Ripley, to recover the sum of five thousand dollars, in which he was assured against

\* Decision rendered April 28th, 1873.

injury and violence by an accident policy issued by the defendant. It was removed into the Circuit Court of the United States upon the application of the defendant, and has been brought here by writ of error by the plaintiffs. The record shows that the only error complained of is that the court held that the insured, walking on foot at the time when the injuries were received by him, was not "traveling by public or private conveyance," as required by the policy.

Our duty is, therefore, limited to the construction of the policy. That instrument was dated on the 8th of May, 1869, and good for one day, commencing with date. It stipulated for the payment of five thousand dollars to the legal representatives of the assured, in the event of his death within sixty days from the happening of the accident, from injuries effected through violent and accidental means; provided that the death was caused by an accident while the assured was "traveling by public or private conveyance in the United States or Dominion of Canada."

After purchasing the ticket, the insured proceeded by steamboat to a village about eight miles from his residence, and from that village he walked home. While on his way he received injuries by violence, from the effects of which he died soon afterward, and within the time limited by the policy.

The question is whether, when he received the injuries, he was traveling by public or private conveyance. That he was *traveling* is clear enough, but was traveling on foot traveling by public or private conveyance? The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, traveling within the terms of the policy. There is nothing to show that it was not.

The judgment of the Circuit Court is, therefore, affirmed.

## UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

*In Error to the Circuit Court of the United States for the District of  
Kansas.*

THE MUTUAL LIFE INS. CO., OF NEW YORK, Plaintiff in Error, }

vs.

MARY TERRY.\* }

The plaintiff in error issued a policy to the defendant upon the life of her husband. The policy provided that if the person whose life was insured should die by his own hand, the policy should be null and void. The husband destroyed his life by taking poison.

There is a conflict in the authorities which cannot be reconciled.

The court would have been justified in pronouncing an agreement made by Terry, under the circumstances, invalid ; a will made by him would have been rejected, if offered for probate, and upon trial for a criminal offense, he would have been entitled to a charge that the jury must acquit him ; and a similar principle must control the present case, although the standard may be different.

If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery.

If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of the act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

There is no difference between a contract like the present, where the insured is not in form a party to it, and one where the contract is with the insured, the policy stating that it is for the benefit of the wife, and that in event of death the money is to be paid to her.

There is no difference in the expressions, "commit suicide," "take his own life," and "die by his own hand." Judgment affirmed. Mr. Justice Strong dissenting.

\* Decision rendered April 26th, 1873.

JULIEN T. DAVIS, Esq., of New York, *for Plaintiff in Error.*

W. W. NEVISON, Esq., of Lawrence, Kas., *for Defendant in Error.*

Mr. Justice HUNT delivered the opinion of the court.

This action was brought to recover the sum of \$2,000.00, claimed to be due upon a policy of insurance on the life of George Terry, made and issued to the plaintiff, his wife.

The policy contained a condition, of which a portion was in the following words, viz.: "If the said person, whose life is hereby insured, \* \* \* shall die by his own hand, \* \* \* this policy shall be null and void."

Within the term of the policy, George Terry died from the effects of poison taken by him.

Evidence was given tending to show that at the time he took the poison he was insane. Evidence was also given tending to show that at that time he was sane, and capable of knowing the consequences of the act he was about to commit.

Thereupon the counsel for the defendant asked the court to instruct the jury :

First. If the jury believe from the evidence in the case that the said George Terry destroyed his own life, and that at the time of self destruction he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

Second. That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action.

Which instructions, and each one of said instructions, the court refused to give to the jury, but the court did charge the jury as follows:

"It being agreed that deceased destroyed his life by taking poison, it is claimed by defendant that he 'died by his own hand,' within the meaning of the policy, and they are, therefore, not liable.

"This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the

poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy.

"It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable.

"To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited, or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy."

The request proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity, does not affect the case.

The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitoria*, that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition, commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress or excitement, does not bring the case within

the rule, if the insured possesses his ordinary reasoning faculties.

The case of *Borradaile vs. Hunter*, 5 Man. & G., 639, is cited by the insurance company. The case is found also in 2 Bigelow Life and Acc. Ins. Cases, p. 280, and in a note appended are found the most of the cases upon the subject before us. The jury found in that case that the deceased voluntarily took his own life, and intended so to do, but that at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong did not prevent the proviso from attaching, that moral or legal responsibility was irrelevant to the issue. The court adds: "It may very well be conceded that the case would not have fallen within the meaning of the condition had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death in either case had ensued. In these and many other cases that might be put, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into." In delivering the opinion of the court, Erskine, J., says all that the "contract requires is that the act of self-destruction should be the voluntary and willful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act, and the question whether at the time he was capable of understanding the moral nature and quality of his purpose, is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself." Chief Justice Tindal dissented from the judgment. In speaking of the verdict he says, "it is not, perhaps, to be taken strictly as a verdict that the deceased was non compos mentis at the time the act was committed, for if this latter is the meaning of the jury, the case would then fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party whilst under the influence of frenzy, delusion, or insanity." This authority was followed in *Clift*

vs. Schwabe, 3 Com. B., 437, where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that, whether the party is a voluntary moral agent, is not in issue.

These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases from Coke and Hale onwards. Coke said "a little madness deprives the lunatic of civil rights or dominion over property, and annuls wills." But, to exempt from responsibility for crime, he says, "complete ignorance of the knowledge of right and wrong must exist." Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis*, or sound mind. Lord Erskine defined it to be the absence of any practicable delusion traceable to a criminal or immoral act.—(*Defence of Hadfield.*) In 1 Prichard (p. 16, on the different forms of insanity) will be found the somewhat lengthy definition of insanity by Lord Lyndhurst—(1 *Shelf. Lun.*, 46.)

The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue.

In *Hartman vs. Keystone Ins. Co.*, 21 Pen. R., 466, the doctrine of *Borradaile vs. Hunter* was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy.

[Concluded in August Number.]

## MISCELLANEOUS DEPARTMENT.

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### THE DEMORALIZATION OF LIFE INSURANCE.

In the May number of *THE INSURANCE LAW JOURNAL* we spoke of some of the amalgamations and reinsurances which were taking place, and of the evil results which followed this irresponsible shifting of assets and liabilities from one company to another. In this article we purpose to investigate some of the causes of this general demoralization in life insurance.

The circumstances which have produced this state of things are well known to many of our readers ; they are aware that it is caused by the rapid growth of new companies, the speculative character of the business as it has been conducted until within two or three years, the high commissions which were paid, the wonderful promises which were made about dividends, the general disappointment among the policy-holders which followed the inability or neglect of the companies to fulfill them, the blunders made by inexperienced men who took charge of the companies—all these and many other causes have combined to greatly demoralize the business, so that it is safe to say that the stockholders of these weak and abortive companies have sunk more than a million of dollars invested in capital stock, and that it has cost the unfortunate policy-holders many times as much in needless expenses paid in losses caused by a want of confidence in companies reinsuring, and in diminished dividends.

Another cause which has produced this state of things is the change from the old percentage plan of paying dividends, to the contribution plan. We do not deny that the latter plan is the most equitable and correct in theory, and that the percentage plan fails in all cases to render exact justice to the insured, and is also deficient in scientific accuracy ; but it had this good quality, in order for the company to pay a forty or fifty per cent. dividend, it was necessary for its officers to exercise great prudence and economy, to cut its expenses down to the lowest practicable limit, to avoid high commissions and all sensational forms of insurance, and the policy-holder, in obtaining



his surplus year after year, even if it was by the cancellation of premium notes, was satisfied that he got his insurance cheaply. Had this plan continued in vogue, some of the defunct and high-pressure offices on Broadway would not have expended from \$10,000.00 to \$17,000.00 per year for rent, and their policy-holders would have been vastly better off. Under the contribution plan many hypothetical tables have been constructed by ingenious and visionary actuaries, showing how a policy starting with a small surplus at the end of the first or second year, would by its annual increase become a self-sustaining or paid-up policy in a few years, and these statements, based upon assumptions which the companies were then in no possible condition to realize, were scattered over the country by thousands, and nothing ever pleased the father of lies so much as to see them used by agents and solicitors. As a general rule, the first part of these assumptions held true, that the dividends would be small at first; but the misfortune was that they continued so till the company amalgamated or passed its dividends, and thus the contribution plan, which has worked well in a few large companies, has ruined many small ones, and in its application to new companies is almost a perfect failure. It has allowed the officers to indulge in any amount of expense and extravagance, knowing that a five per cent. dividend would be as good as a fifty per cent. one, provided they made magnificent promises in the future; and it opened as wide a door for deception, and almost downright swindling, as anything which could be invented. Had these companies been compelled to husband their resources, so that they could pay a forty or fifty per cent. dividend under the percentage plan, they would have been in a prosperous condition to-day. They would have exercised more care in the selection of their risks, their expenses would have been less, and the *morale* of their business would have been greatly improved.

Another reason for this general demoralization is the change from a four to a four and a half per cent. reserve. One of the principal arguments in favor of a four and a half per cent. standard was that the other was too high, that it held back too much reserve, and that the difference ought to be distributed as surplus; but the fact is, that the four per cent. companies pay on an average twice as large dividends to the policy-holders as those which adopt the lower standard, and although this statement may seem rather paradoxical, any person who will take the trouble to examine it for himself will see that the higher reserve is almost always accompanied by greater dividends. Why is it that all these failures and amalgamations have

taken place in New York and in States farther west? What is there in the laws of this State or the methods of doing business that has caused the reinsurance of fourteen or fifteen companies, and the prospective decrease of as many more? What is the matter with our boasted Insurance Department at Albany? And what is the trouble with the low rate of reserve which has caused such an epidemic of infant mortality among the companies? And why is it that some of our young companies are struggling hard to get *up* to a six per cent. reserve in order to reinsure? Is official supervision in New York a failure or a farce? Why is it that there are no re-insurances in New England, and all her companies, with perhaps one exception, are as substantial as the Pyramids of Egypt? Why is it that rumors of amalgamation, transfer, selling out and pocketing the surplus are never heard in that locality? Simply, because the law compels them to be sound and to adopt a standard of more than average safety.

In the May number of *THE INSURANCE LAW JOURNAL* we gave a list of thirty-nine companies which at various times had retired. Not one of these was in a State where a four per cent. standard was required except a few companies in Chicago, which reinsured as soon as that standard was adopted in Illinois. And it is safe to say that if energetic and vigorous insurance departments had compelled these companies to adopt a four per cent. reserve from the time they issued their first policies, they would have been in a prosperous condition to-day, or else, which is more likely, most of them never would have started. A low standard of reserve, then, is the bane of weak companies; instead of being their aid and support, it has already proved the ruin of one third of the companies in the State of New York and many in other States.

Another cause of the present state of affairs is the inefficiency of the insurance departments. Looking at the wrecked companies here, one would think that the Insurance Department of this State has been a perfect failure, and so it has, in some degree, in its inability to maintain a solvency among the companies; but insurance officials are not always to blame for the ignorance and stupidity of legislators on insurance matters, nor can they always have such laws as they know are best adapted to the protection of the policy-holders. In the legislatures of New York, Ohio, and Illinois, during the past winter, some of the most dangerous and idiotic bills on insurance topics were introduced and found many supporters, and only two or three years ago a bill was introduced into the Massachusetts Legis-

lature chartering a co-operative insurance company, and would have passed, had it not been for the strenuous opposition of the Insurance Commissioner. Of all classes of men, legislators are the most stupidly ignorant and bigoted on the subject of insurance, and, as a general rule, care more about obtaining votes and patronage than the protection of policy-holders; yet these are the men who create our insurance departments and limit the duties of the superintendents.

But with all of these defects in legislation, it is the duty of insurance officers to keep ahead of the times. If they cannot make new laws they can administer what they have with firmness and impartiality. If they cannot suspend a rotten and worthless company they can expose its true condition to the public; they can influence public opinion by a faithful discharge of their duty, and wait for more enlightened legislatures to come up to their standard of excellence. But there is one thing which they can do and which is too much neglected in almost every State—they can find out whether the companies tell them the truth or not in their annual statements. A few hours' examination of the Anchor Life would have shown to any one of a dozen insurance departments how rotten it was, what assets belonged to the company, and what were loaned to it to swell the amount and make a respectable showing. A large number of the weaker companies seem to exist for no other purpose than to deceive the insurance departments about their real condition. To accomplish this, anything which can by any misnomer be called "assets" is included under that head, and for a large portion of the year the only means which the public have of gaining any knowledge of their condition are the unsatisfactory and often treacherous advertisements prepared by themselves, which are widely circulated months before any official statement is given, and which every experienced insurance man knows will not bear a careful investigation. The Anchor Life, of New Jersey, is not the only company which has the reputation of falsely reporting United States bonds and other securities among its *bona fide* assets, but which were simply loaned to it or temporarily deposited in its vaults while the annual statement was being prepared. Other companies have been known to be guilty of the same deception, and our insurance departments have, as a general rule, accepted these statements without hesitation.

When will these abuses cease? Not until the people hold the insurance departments responsible for the solvency of all the companies which operate within their respective States. If the failure of any life company or any fire company, under ordinary circumstances, en-

tailed sufficient disgrace upon any insurance official which had admitted it within his State, to cause his speedy removal from office, there would be more and better examinations and fewer failures. If insurance officials had sufficient firmness and independence to expose every case of deception and misrepresentation which comes under their official notice, if legislatures were honest and intelligent enough to make such laws as would protect the policy-holders against the irresponsible despotism which companies often exercise over them, and finally, if the people were sufficiently informed to know when the companies treated them with ordinary fairness and honesty, then there would be a fair prospect that this present demoralization in life insurance would cease.

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#### CASES REPORTED.

The present number of the JOURNAL contains a full report of the decisions in eight insurance cases.

In *The Merchants' Ins. Co., of Chicago, vs. Morrison*, the policy, upon which the suit arose, was on a vessel navigating the lakes, and was for a period of seven months. The court held that the policy was not a voyage policy, and that the warranty of seaworthiness at the commencement of the voyage, applicable to voyage policies, did not apply so as to relieve the insurer from a loss by fire, not arising from want of seaworthiness. The subject of warranty and seaworthiness in connection with voyage and time policies, is fully discussed in the opinion. The decision was rendered in the Supreme Court of Illinois.

In the case of *Hayward, assignee, vs. The National Ins. Co., of Hannibal*, decided in the Supreme Court of Missouri, the company refused to pay the loss on the ground that the insured had prior and subsequent insurance upon the property, contrary to the provisions of the policy. The evidence showed that the agent and officers of the company knew of the prior insurance at the time the policy was issued, and that the insured informed the agent of the company of the subsequent insurance, at the time it was obtained, and was told by him that it was all right. The court decided that good faith required the company to indorse its consent to the prior insurance upon the policy at the time it was issued, and that the insured

had a right to expect that it had been so indorsed, and that the notice to the agent of the subsequent insurance was notice to the company, and that his assent amounted to a waiver, by the company, of the condition in the policy requiring the consent to be indorsed upon it in writing.

*The Merchants' Mutual Ins. Co. vs. Lyman* was decided in the United States Supreme Court, and the judgment of the Circuit Court for the District of Louisiana reversed. The plaintiffs, after they had learned of the loss of their vessel, obtained a policy of the company without informing it of the loss, and claimed on trial that they had a verbal agreement with the company to renew a policy that had expired a short time before. The court held that the company was entitled to the information the plaintiffs had of the loss, and that having destroyed the validity of the contract by their own fraud, the plaintiffs could not, for that reason, treat the policy as if it had never been made, and recover on the verbal statements made before its execution.

The case of *Raber vs. Jones et al.*, arose under the statute of Indiana, and was decided by the Supreme Court of that State. The statute made the directors of the insurance companies liable, on failure to act in certain cases, under an execution upon a policy. The plaintiff brought suit against the directors on an execution on a note. The court held that the statute was to be construed strictly, and could not be extended to cases where the recovery had been on something else than a policy.

In *Murrin, petitioner, in the matter of Owen et al.*, the petitioner asked that the proceeds of two policies, issued upon the life of his wife for his benefit, should be paid over to him by his assignee in bankruptcy, to whom the insurance had been paid. The wife paid one annual premium before the petitioner was adjudged a bankrupt, and two afterward. The United States Circuit Court for the Eastern District of Missouri, in which the case was decided, held that the husband at the time of his bankruptcy had no such interest in the policies as gave his assignee the right to the proceeds, and that the petitioner was entitled to the amount of the insurance.

The case of *The Washington Mutual Fire Ins. Co. vs. St. Mary's Seminary* arose upon a premium note. The chief officer of the seminary was by its charter denominated "Superior," and his name was signed to the note as "Pres't." The Supreme Court of Missouri held that if there was any ambiguity in the note or policy, parol evidence was admissible for the purpose of explanation that no proof of

any special authority to the agent of a corporation or of authority by its seal was required, and that the term Superior was tantamount to President, and meant the same thing.

*Ripley, et al., vs. The Railway Pass. Assur. Co.*, decided in the Supreme Court of the United States, arose upon an accident policy, and the decision rested on a provision in the policy restricting the insurance to death caused by accident while the assured was "traveling by public or private conveyance." The court held that a person traveling on foot could not be considered as traveling within the terms of the policy. A question was also raised by the defendant's brief, and was considered in the court below, as to whether the death was the effect of "violent and accidental means." The assured was attacked by highway robbers, and received injuries from which he died, and it was claimed that if the violence was intentional, it was not accidental. Judge Withey, however, decided the case mainly upon the same ground as that taken by the Supreme Court in affirming the judgment.

In *The Mutual Life Ins. Co., of New York, vs. Terry*, the policy sued upon provided that if the person whose life was insured should die by his own hand, the policy should be void. The court held that there is no difference in the expressions "commit suicide," "take his own life," and "die by his own hand," and that where the assured intentionally takes his own life from anger, pride, jealousy, or a desire to escape the ills of life, there can be no recovery, but that where his reasoning faculties are so far impaired that he is not able to understand the character and consequences of the act, or where he is impelled by an insane impulse he cannot resist, the insurer is liable. The assured had destroyed his own life by poison. The decision was rendered in the Supreme Court of the United States, and the judgment of the Circuit Court for the District of Kansas, in favor of the plaintiff and against the company, was affirmed, Mr. Justice Strong dissenting. The charge to the jury in the Circuit Court is reported in 1 Ins. Law Journal, 132. The court there held that there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and that the burden of proof to establish insanity was upon the plaintiff by whom it was alleged. A part only of the opinion is given in this number ; the remainder will appear next month.

## MISCELLANEOUS.

### AMENDMENT TO THE BANKRUPT ACT.

AN ACT to amend an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven.

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That* whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such state for the purpose of winding up the affairs of such corporation or company, and dividing its assets ratably among its creditors, and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court, agreeably to the State law, for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

Approved February 13th, 1873.

### PENNSYLVANIA INSURANCE LAW.

A comprehensive law for the regulation of insurance business in Pennsyl-

vania was approved April 4, 1873. In its general character it is similar to the laws of those States which have legislated most fully upon insurance.

*Insurance Commissioner.*—An Insurance Department is created and placed in charge of a commissioner, who is appointed by the Governor, to be confirmed by the Senate, for a term of three years; his salary is \$3,000 per annum and he is required to give a \$10,000 bond. He must calculate on the basis of the American Experience Mortality Table and four and one half per cent. per annum, the net value of all policies of life insurance companies organized in Pennsylvania, and also of all other companies that have failed to furnish the proper certificate. This rule is modified in case of companies having \$500,000 cash capital invested. In such the reserve shall be calculated with interest from 4½ to 6 per cent. per annum, in the discretion of the commissioner. He shall see that companies have on hand the net value of all policies in force, and in cases of companies from other States he shall accept valuations of the insurance commissioner of the State in which any such company is organized. In calculating the reserve in fire insurance he shall take 50 per cent. of the premium received on all unexpired risks having less than a year to run, and a *pro rata* on those running longer; and in marine and inland insurance he shall charge all the premiums received on unexpired risks. He is charged with the customary duty of seeing that the capital stock of any company be not impaired, and of proceeding promptly against any insolvent company, and to facilitate his investigations he has the usual plenary powers of visitation. He shall employ an actuary who shall be paid 3 cents per \$1,000 of insurance. This expense is provided for out of fees paid in by the companies doing business in the State. Should the amount

of such fees be insufficient the commissioner shall assess the companies in just proportion to make up the deficit.

*Provisions applicable to all companies.*

—Within ninety days from first Monday in May every company shall file with the commissioner a certified copy of charter, and a certified statement of the time and place of its organization, its principal office, and the names and residence of its officers. For each month's delinquency in this there is a fine of \$100.00. It shall not be lawful for any person or company to do insurance business until the provisions of this act are complied with.

*Companies of other States or foreign governments.*—They shall pay a tax of three per cent. on all premiums of every character, whether money, notes, or credits; make yearly reports, and shall certify the names of all their agents in the State. And all such agents in turn must have a certificate that the companies they represent have complied with this act, and that they have authority to represent the company. The companies are required to stipulate that legal process affecting them may be served upon the commissioner, or a specified local agent. Companies not of the State are not affected by the law until 1st January, 1874.

*Foreign companies.*—Concerning their business done out of the United States, they shall make up their statements to 1st July of each year.

*Home mutual fire companies.*—With the exception of the provision for the filing of a copy of charter, etc., they are not affected by the law.

ledge accidents frequently happen, and it is therefore both interesting and necessary that every one should be well informed upon this point. Scientific and practical men, both in Europe and America, have lately given considerable attention to the subject, and made extensive and exhaustive experiments, the result of which is, that reliable data are now obtainable, from which we present our readers with the following table:

TABLE OF TEMPERATURES REQUIRED FOR THE IGNITION OF DIFFERENT COMBUSTIBLE SUBSTANCES.

Substances.	Ignites at degrees Fahr.
Phosphorus, (melts at 110°) .....	140
Bisulphide of carbon vapor, (melts at 130°) ..	300
Fulminating powder, (used in per. caps) ..	374
Fulminate of mercury.* .....	392
Equal parts of chlorate of potash and sulphur.....	395
Sulphur, (melts 280°, boils 850°) .....	400
Gun-cotton.* .....	428
Nitro-glycerine.* .....	494
Rifle powder.* .....	550
Gunpowder, coarse.* .....	563
Picrate of mercury, lead of iron.* .....	565
Picrate powder for torpedoes.* .....	570
Picrate powder for muskets.* .....	576
Charcoal, the most inflammable willow } used for gunpowder.† .....	580
Charcoal, made by distilling wood at 500°† ..	660
Charcoal made at 600°† .....	760
Picrate powder for cannon .....	716
Very dry wood, pine .....	800
" " " oak .....	900
Charcoal made at 800° .....	900
" " " 1800° .....	1100
" " " 2400° .....	1400
Aluminum .....	1832
Iron, about .....	2000

It will be seen by these facts that the most combustible substances, generally considered very dangerous, will only ignite by heat alone at a high temperature, so that for their prompt ignition it requires the actual contact of a spark, which is equal, in fact, to a temperature of 900° or 1000° applied to a very minute spot of the mass.

\* According to Legue and Champion.

† According to Pelouse and Frémy.

#### POINTS OF IGNITION.

It is important that there should be no doubt as to the degree of temperature at which combustibles will ignite; but from the want of this know-



As the heat of superheated steam ranges from 300° to 500°, it is only able to set fire to such substances as sulphur, gun-cotton, and nitro-glycerine. It is, perhaps, able to fire gunpowder, but certainly cannot ignite wood. A great deal has been written and said lately about spontaneous combustion, but it is only when dried wood, saw-dust or rags have been saturated by any drying oil or other equivalent, that the temperature may be indefinitely raised, and finally reach 400°, 500°, or more degrees, until the point of inflammability is attained, and this is caused by the oxidation of the oil, and presenting a large surface to the agency of the air. This may happen in buildings not heated at all, as spontaneous combustion is the result of chemical action; but, of course, summer heat, and the heating of buildings by hot air, or otherwise, often favors ignition.—*Iron Age*.

#### RESULTS OF SANITARY IMPROVEMENTS IN TOWNS.

Dr. Stephen Smith, of New York, contributes the following interesting article on the results of sanitary improvements in towns, to the new monthly magazine, *The Sanitarian*:

History abounds with examples of cities which were anciently very unhealthy, but which became noted for the longevity of their inhabitants after they fell under the dominion of civilized conquerors. The reforms which were instituted related generally to an improvement of the dwellings of the people and to drainage. London and Paris are striking examples of improvement in the public health on the introduction of sanitary works. In the seventeenth century London was the most unhealthy capital of Europe, and though no decided efforts were made to improve her sanitary condition until within the last quarter of a century, the health of her people

has gradually improved, until now she is the healthiest of the large cities of the world. At the beginning of the fourteenth century, Paris lost her population at the rate of 50 in every one thousand annually, and though she has increased three hundred and fifty times since that period, previous to the late war her death-rate was about twenty-eight in the one thousand living. At the close of the sixteenth century the average duration of life in Geneva was about twenty-one years, and in 1833 it was forty-five years and five months. Sanitary science is now cultivated in England with an enthusiasm and success creditable alike to her government and people. The results which have followed the introduction of sanitary works into English towns are most instructive and encouraging. They teach us that towns may be made nearly as healthy as the rural districts; that in many cases fifty per cent. of the deaths are due to causes which may be removed; that it is criminal to sit down and fold our hands when great destructive evils exist in populous towns, and declare that they are beyond all remedy. Many examples might be given in illustration, but the following will suffice:

Salisbury is an old town which formerly had open channels or canals in its streets. As the city grew, these canals became very foul with sewage and filth. Its drainage was very imperfect, and overflowing cesspools made the water of the wells very impure. It is stated that in ninety years Salisbury was visited by the plague five times, and in one attack one fourth of all the inhabitants perished. In 1853 the authorities began the work of improvement; sewers were constructed, drains laid, streets paved, and pure water was introduced. The result is as follows: For nine years before improvements, 27 in every 1,000 population died; for nine years after, 20 in 1,000. Mr. Chadwick says: "One year in every three in Salisbury is a ju-

bilee year—entirely free from death.” Croydon was once regarded as the “worst district in the country in a sanitary point of view.” It had neither sewers nor drainage, and filth was everywhere allowed to accumulate. Sanitary improvements began in 1850, and were completed in 1853; they consisted in drainage, sewerage, removal of filth, and the introduction of pure water for families. The death-rate fell from 28 in the 1,000 population to 18, and one year to 15 in the 1,000. Macclesfield is another striking example of the value of sanitary works. Its death-rate was thirty-three in the 1,000 before improvements were made. The year following the completion of these works the death-rate fell to 25 in the 1,000 population. And this diminished mortality was greatest in those streets where the improvements were greatest. In one street the mortality fell 60 per cent.; in another 42 per cent.; in another 40 per cent. It may be alleged that these are small towns and more susceptible of improvement than large cities, but the assertion does not prove true. It is susceptible of proof that populous towns may be so improved as to render their death-rate 10, 12, and even less, in the 1,000. Liverpool was long regarded as the most unhealthy city in the civilized world. She had a population of 20,000 living in cellars, and her laboring classes were crowded into old and ill-ventilated buildings, surrounded by filth, cesspools, etc. Infectious diseases, typhus, etc., prevailed to a fearful extent. In 1847, Dr. Duncan began the work of arousing the people to a recognition of the importance of sanitary reforms, and was finally successful. The cellar population was removed, fever-nests were cleansed, cesspools were closed, etc. The result was magical; typhus almost entirely disappeared, as also smallpox, and the death-rate fell to 15 per 1,000

within five years. No less striking was the results of sanitary works applied in London. The *London Times* says that “the average of health throughout the city of London is higher than the average of health throughout all England, taking town and country together. The mortality in all England is at the rate 22.8 in every 1,000 of the population; in the city of London it is at the rate of 22.3 for every 1,000 inhabitants! The improvement has been progressive; it has been slow, but steady and sure. Gradually the mortality has decreased, until the yearly death-roll of 3,763 has been reduced to 2,904 within the period of nine years, during which the city has been under the rule of the sanitary commission. The deaths this year—22.3 per 1,000, or one in every forty-five of the inhabitants—are nine per cent. below the general average, and represent a saving of 286 lives. And secondly, this gratifying result has been obtained in the face of obstacles which seemed to be almost insurmountable.”

These examples of the power of sanitary works to redeem old towns and cities from the dominion of such plagues as typhus and typhoid fevers, diarrhoeal affections, diphtheria, etc., are of remarkable significance and import to the citizens of the United States. Our existing cities and villages are for the most part the growth of but a few years, and hence extremely susceptible of improvement. They admit of thorough drainage and sewerage, and pure water can be readily supplied to the inhabitants. They are as yet comparatively free from such surface saturation with excretions of man or animals as will poison the air, and measures for utilizing or rendering such materials innocuous can readily be executed. We are also daily selecting sites for, and laying the foundations of new cities and villages which are to be the future homes of untold thousands.

These cities may be selected, and the foundations may be laid so as to render those towns as healthy as the healthiest of the rural districts, and thus confer upon coming generations the inestimable blessings of health and longevity.

#### ATLANTIC STEAMERS.

There is an average loss of about one vessel for every 350 round trips of transatlantic steamers. From the following, however, it will be observed that the experience of the various lines is notably unequal :

Cunard—in 32 years has lost two vessels.

Inman—in 18 years has lost one vessel.

Hamburg—have made 544 trips, losing one vessel.

North German Lloyds—have made 580 trips, losing one vessel.

French—have made made 450 trips, losing none.

National—have made 414 trips, losing none.

Anchor—have made 457 trips, losing three vessels.

Williams & Guion—have made 300 trips, losing two vessels.

White Star—have made 75 trips, losing one vessel.

Baltic Lloyds—have made 19 trips, losing none.

Black Star—predecessor of the Williams & Guion, in 24 years lost none.

#### PUBLIC HYGIENE.

While cure or palliation is the object of *medicine*, prevention is the object of *hygiene*; while the one studies the good of the unit, the other looks at the welfare of the mass; both make disease a study, and belong to the same class of sciences, but in different ways.

The physician asks, what will *cure* an *ague* or mitigate a fever? the health officer, what will *prevent* them?

It has to do with persons of every rank, of both sexes, of every age. It takes cognizance of the places and houses in which they live; of their occupation and modes of life; of the food they eat, the water they drink, the air they breathe; it follows the child to school, the laborer and artisan into the field and workshop; the sick man into the hospital; the pauper into the poor-house; the lunatic to the asylum; the thief to the prison. To all these it makes application of a knowledge remarkable for its amount and the great variety of sources whence it is derived. To physiology and medicine it is indebted for what it knows of health and disease; it levies large contributions on chemistry, geology and meteorology; it co-operates with the architect and engineer; its work commends itself to the moralist and divine.

It transmutates these facts into scientific truth by the numerical method so often confounded with its leading application—statistics. If this word meant what it once did—the science of States—then hygiene would rank among its leading subdivisions as applying to the great State policy of prevention to health and disease.—*Guy*.

For a perfect system of hygiene we must combine the knowledge of the physician and the schoolmaster and the priest, and train the body, intellect and the moral soul in a perfect and balanced order.—*Parkes*.

#### MORTALITY IN THE UNITED STATES.

If one takes up the second volume of the ninth census of the United States in search of a region and climate free from deadly disease, he will soon come to the conclusion that he has at the best, go where he will, only a choice of unpleasant

ant deaths. And wherever he happens to live, he may conclude it is safest to stay there.

The most novel things in the volume are a set of maps which present the range, and within the range the prevalence of certain specific diseases or groups of diseases, prepared from the census tables of mortality. As in politics we used to have maps showing the free States light and the slave States dark, and shading into black where the slave population was largest, we now have maps showing to the eye by shades of color where consumption prevails and where it is not prevalent, and other maps exhibiting the ravages of other diseases. Of course the colors cannot show the exact unhealthfulness of each small locality, but only approximately. This ingenious device might be used in other maps, that should show one at a glance where he would be safest from accidents, from gun-shot wounds, from pistol-balls, let us say, or bowie-knives, (for the census takes note of all these things,) and where he would be most likely to be killed by a jealous woman or by a drunken man.

If one looks at the maps showing deaths from consumption, with reference to choosing a place of safety, he will not find much rest for the soles of his feet. The lower portion of Florida is free, and so are a few spots in Georgia, a spot in west North Carolina, and a spot in the western portion of Virginia, and a part of lower California and of upper California. The free places in California are not on the coast, and a large part of it—that most settled—is as blue with consumption as Maine. There is a little spot in the Adirondac woods that is only slightly shaded, like portions of the south below Tennessee, where the deaths are from 250 to 550 in 10,000.

Maine, New Hampshire, upper Vermont, Rhode Island, northeastern Con-

necticut, all of Massachusetts except a strip on the west, and all northern New York except one spot, are heavily blue, the deaths from consumption being over 2,000 in 10,000. This dark blue (called the fifth shade) dots huge fragments in all the Middle States. Connecticut, west of the river and along the Sound east of it, southern Vermont, Long Island, and a considerable portion of New York take the second color, deaths from 1,400 to 2,000 in 10,000. This fourth shade is wide spread over the north, and especially over a large part of southern Illinois, Missouri and Iowa. The portion of Minnesota which is inhabited is all of the third shade, 900 to 1,400 deaths in 10,000. The second shade (550 to 900 deaths in 10,000) is rather the prevailing shade in the South, though it is liberally lightened by the first shade, 250 to 550. But a fragment of Florida—the part that northerners most frequent—is of the second shade, the same as the whole of South Carolina and northern Georgia. And lower Louisiana, the region about Mobile and parts of Texas are of the third shade, 900 to 1,400 in 10,000. The map is a very blotched-looking one. In the lower corner of Kansas and Missouri is a dark spot no better than Connecticut. It is to be observed that in the white patches the deaths from consumption are 250 in 10,000, so that no place is absolutely free.

But if the reader decides to live on one of these white places, or on one only a little shaded, let us see what will become of him. He will pretty certainly die of a malarial disease. And if he looks at this yellow map of malaria, he will pretty certainly hurry back into Maine, Massachusetts, or some country he ran away from to escape the consumption. He will be also pretty safe in most of New York, New Jersey, Pennsylvania, and Virginia, but he will only find a few white spots in all the

South—in northern Georgia, in southeastern Mississippi, part of Tennessee and Kentucky, and a few others. Florida, which looked so attractive to him on the other map, will frighten him in this. In the region he would be most likely to settle in, he would die 1,400 in 10,000. The North even is not all safe. About New York city and Brooklyn, and in Litchfield County and contiguous counties in New York, the deaths from malarial diseases are from 100 to 250 in 10,000, and one might settle in malaria even in Maine.

If one is unsettled in his mind by these facts, and turns to the map of deaths from enteric, cerebro-spinal and typhus fevers, he will wish he lived neither North or South, though the extreme South looks more cheerful, and in most of Florida, and in spots elsewhere, and in spots in Virginia, the deaths are only 250 from these fevers in 10,000. If one lives in Connecticut or western Massachusetts, he had better move into eastern Massachusetts. The deaths in Connecticut, except a lighter strip toward New York city, are 550 to 900 in 10,000. Let him beware of a big spot in Minnesota, and of a large slice of Georgia, from the coast westward, for there the deaths are over 2,000 in 10,000. And in portions of Maine and New Hampshire the deaths are from these fevers from 900 to 1,400 in 10,000. California is freer from them than it was from the yellow malaria, but it is slightly stained with these pink fevers.

But there is one resource left, and that is intestinal diseases. And here the hope is slight; the map is very green with them. There are two white strips, one in west North Carolina and one in Tennessee, running up into Kentucky, and two in Texas, but otherwise the map is shaded. Here, however, the most of Florida and portions of the South are better off than the North, but there are

many blotches in most of the States. Portions of northern Florida are like most of Connecticut and Massachusetts, 900 to 1,400 deaths in 10,000. Upper California is little better. Western Iowa is bad. A good deal of Mississippi is light—100 to 250 in 10,000—but there is a long, deep-green patch in it, where over 1,400 people die of intestinal diseases in 10,000; and this isn't the bowie-knife region along the Mississippi River either.

They are melancholy maps, take them as a set, and the persons studying them long will want to emigrate to Santo Domingo, or some other place where there are no diseases, or where there is no government to report them.—*Hartford Courant*.

#### A LONDON BARRISTER.

London barristers oftentimes find it up-hill work to earn a living. Latest advices, by mail, report a particularly sad case, that of a barrister named Hugh Weightman—a person of learning and ability—who, to save himself from starving, in March last stole a book from a public library and sold it for ten shillings. He was arraigned and found guilty, with a recommendation to mercy. On being called up for sentence, he asked that the court disregard the recommendation and give him the full term, continuing:

"I know my doom is fixed. I have no wish to go again into the world. I believe your lordship has power to sentence me to five years' penal servitude. I court that sentence. I cannot suffer more than I have suffered. I have gone for weeks and months without a dinner—living upon such nutriment as bread and tea. I have sold the coat from my back, the shirt from my body, to supply daily wants. I have worked hard upon the shelves of the Inner Temple

library. There are books there of which I am the author, which I have presented to the library, of much more value than the odd volume which has formed the subject of this charge against me. I have done all that mortal man could do to obtain an honest and honorable livelihood. The character I have maintained as a man of honor being now cut from under me, I can never again associate with gentlemen, and I shall be only too glad if your lordship will inflict upon me the full meed of punishment within your power, in the hope that before the extent of it has elapsed I may find in a felon's grave that repose which I have vainly sought in the pursuits of life."

He was sentenced for six months.—*Legal Opinion*

#### MORAL HAZARD IN FIRE RISKS.

As one means of removing the difficulties in the way of determining the "moral hazard on fire risks," it is proposed by some able writer, interested in the well-being of our insurance interests, that losses occurring from fires originating upon the premises should not be paid in full, and that a clause to that effect be inserted in all fire policies. In Paris a fire insurance policy never covers the loss of any property when the fire originates on the premises, and losses are never paid unless the property is destroyed by reason of the fire communicating from an adjoining building. It is said that this system of fire underwriting eliminates entirely the vexed and vexing questions of moral hazard, carelessness, and negligence. It offers a premium for care, scrupulous attention, economy, and honesty, and were all policies hereafter to be written in this way, there would be a beautifully less number of accidental fires, especially of such temporary business houses.—*N. Y. Mercantile Journal.*

#### THE POSTAL CARDS—A NEW QUESTION.

The cheapness of the new postal cards, which have been recently inaugurated, has already resulted in gaining for them an immense sale. The fact that the Government will furnish the stationery for correspondence, and carry the letter a thousand miles for a single cent, is both novel and astonishing; but the operation of the new arrangement presents a complete illustration of the principle involved in "the nimble sixpence." But the issue and use of the new cards have already given rise to a new question, and that is, as to what kind of matter may be transmitted on these cards, and whether they are not likely to result in many lawsuits growing out of the exposition of private affairs which may not be legally or legitimately published to the world. For example: Recently, a respectable claim agent in Philadelphia, with an eye to economy, procured a number of cards from the post-office, and had them printed as a circular letter or note. The phraseology used was somewhat as follows:

"Sir:

A claim against you for \$—— has been placed in our hands for collection, by, Messrs. ———. Please call and see us on the subject."

The exposition of the fact stated in this note was deemed by a party injurious to his credit, and, consulting his counsel on the subject, the usual legal missive was addressed to the collecting agent, who, on reflection, concluded that it was prudent to discontinue the sending of such open "duns."

The laws of all the States declare that the publication, in any way, of any matter that is either designed or calculated to injure a person, is a libel, and may be punished by the infliction of fines and imprisonment, or an assessment of damages; and it is claimed, not without reason, that the sending of

any such matter through the mail, in a manner which exposes the writing to a number of persons, renders the sender of it liable to a prosecution for damages. We do not propose to argue or decide this question, but it is certainly worthy of consideration, and will claim the attention of many legal minds.—*Phil. Underwriter.*

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SIR SAMUEL ROMILLY.

Sir Samuel Romilly, the son of a jeweler, came to the bar, as he himself afterward said, that he might leave his small fortune to his father, instead of buying a sworn clerk's seat with it. "At a later period of my life," said he, "after I was gaining an income of £8,000 or £9,000 a year, I often reflected how all that prosperity had arisen out of the pecuniary difficulties and combined circumstances of my father."

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THE REPUBLIC INSURANCE COMPANY.

Something over one hundred suits were brought in the U. S. Circuit Court for Iowa by the assignee of the Republic Insurance Company against stockholders of that company. On the 19th of last month a motion was made and argued in one of the cases, taken as a test of all, for its dismissal for want of jurisdiction. The claim made by the stockholders' counsel was that the bankrupt act conferred exclusive jurisdiction in all bankrupt proceedings upon the District Courts, except in the special cases where by the law certain powers in that connection were conferred upon the Circuit Courts; that this case did not come within any of the exceptions; and that neither in the U. S. Circuit Court nor in any of the State Courts could the assignee of a bankrupt sue for a debt due the estate, but could resort only to the process of the bankrupt

court. On the 25th Judge Dillon rendered an elaborate decision, holding that the jurisdiction of the court was plain, and therefore denying the motion. The stockholders must now either appeal to the Supreme Court, find some other technicality upon which to hang their hope of escape, or defend upon the merits. As their case has no "merits" and is equally destitute of "grace," it is not difficult to see where they will fetch up.—*Herald.*

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ITEMS.

Prof. H. A. Newton, in the *New Englander* for April, has written upon the law of mortality prevailing among the former members of the Yale Divinity School. He concludes as follows: "Up to an age between 40 and 45 the total expected (according to the usual experience tables) and actual (of the members) mortality are equal. About that age the actual mortality is above three fifths of the expected."

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"Manners," said the eloquent Edmund Burke, "are of more importance than laws. Upon them, in a great measure, the laws depend. The law can touch us here and there, now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine, by a constant, steady, uniform, insensible operation, like that of the air we breathe in."

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When any skeptic or bigot claims to be heard on the questions of intellect and morals, we ask if he is familiar with the books of Plato, where his pert objections have once for all been disposed of. If not, he has no right to our time. Let him go and find himself answered there.—*Emerson.*

## CURRENT TOPICS.

—We have received transcripts of decisions in the following cases :

*St. Louis Tow Company vs. Orphans' Benefit Ins. Co., of St. Louis.*—Supreme Court, Mo.

*Ripley, et al., vs. The Railway Passengers' Assurance Co.*—U. S. Supreme Court.

*Merchants' Mut. Ins. Co., of New Orleans vs. Lyman et al.*—U. S. Supreme Court.

*The Mut. Life Ins. Co., of New York, vs. Terry.*—U. S. Supreme Court.

*Ferrier vs. Home Mut. Ins. Co.*—Supreme Court, Cal.

*Delmas vs. The Merchants' Mut. Ins. Co., et al.*—Supreme Court, La.

*Arkansas Marine, Fire, etc. Ins. Co. vs. Bostwick, et al.*—Supreme Court, Ark.

*Benneson, Rec'r of The Farmers' and Merchants' Ins. Co., vs. Smith.*—Supreme Court, Ill.

*The Knickerbocker Ins. Co., of Chicago, vs. Comstock, et al.*—U. S. Supreme Court.

—The St. Louis Mutual Life is in trouble. To go no further back than the present year, the officers of that company neglected and refused to file their annual statement for 1872, until the Superintendent of the Insurance Department instituted legal proceedings against them. This naturally attracted public attention and created a feeling of distrust and alarm among the policy-holders of the company, which the statement itself, when at last it appeared, was not calculated to allay. The unwise course since pursued by the managers of the company unfortunately tended only to increase the suspicion, for instead of openly and candidly showing the real state of affairs, they attempted to follow the stupid and foolish example of another company, whose past course should have served as a warning, and expected to sa-

tisfy the community by advertising the result of extemporaneous investigations made by committees of respectable directors and policy-holders.

Attendant upon this state of affairs, or rather resulting from it, is a suit against the directors of the company in the St. Louis Circuit Court, brought by one of its policy-holders. The complaint charges that the directors have been guilty of mismanagement and misappropriation of funds belonging to the policy-holders ; that they have squandered nearly one million dollars in erecting an extravagant building, and have fraudulently used large amounts in reinsuring the Atlas Life and assuming its liabilities ; that there have been no dividends declared for two years, and that they have kept secret the affairs of the company, etc., and in conclusion asks that the directors be enjoined from managing or using the funds, and that an investigation be made of the affairs of the company, and a receiver appointed. The plaintiff's attorney's have been engaged in examining and taking the depositions of persons connected with the office, and though they have not yet concluded their labors, enough has already been developed to put the managers seriously upon the defensive. The officers and directors, if they are wise, will not rely, for vindication, upon the cry of blackmailing and malicious prosecution. The public will look at the facts brought to light by a legal investigation, and their bearing upon the condition of the company, and will care little by whom or for what purpose it was instituted. There are companies in the country and in St. Louis that are beyond the reach of harm from any such quarter.

—A Federal Bureau of Insurance is advocated by the Baltimore *Underwriter*.

—A hatter advertises that "Watt's on the mind is of great importance, but what's on the head is of greater."



ments in the declaration that the plaintiff was the wife of the deceased, and in regard to his health and freedom from certain specified diseases, were false. *Held*, that "it is immaterial whether, if untrue, those declarations were not *intentionally* untrue, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death. Contracts like that sued on are based for their validity upon the truthfulness of the declarations made by the applicant in the written application to the company. As the declarations are presumed to be true, the burden of proving them untrue is upon the defendant, who controverts them. Whether the representations were material to the risk or not, is not open to inquiry in this case."

*Holabird vs. The Atlantic Mut. Life Ins. Co.\**

Rep'd Jour'l p. 598.

U. S. C. C. R. DIST. MO.

#### ASSESSMENT.

§ 120. FIRE.—*Penalty against Directors—Statute.*—The company, of which the appellees were directors, insured the appellant's barn, which was afterward destroyed by fire. After the loss the company gave the plaintiff a note for the amount of the loss, and received from him a receipt in writing discharging the company from all further claim on account of the loss. This note the company afterward took up, paying part of the amount in cash and giving a new note for the remainder, upon which the plaintiff afterward brought suit and recovered a judgment. The directors failed to satisfy the execution issued upon the judgment, or to make an assessment upon the policy-holders. The statute relating to insurance companies provided that "whenver sufficient goods or estate of any such corporation cannot be found to satisfy an execution issued against them upon a judgment recovered on a policy by them made, and the said corporation have goods or estate to satisfy such execution, and the directors shall neglect or refuse to pay the same, or if the directors shall for thirty days after the rendition of such judgment refuse or neglect to make such an assessment as they may be authorized to make therefor, and to deliver the same to the treasurer—

\* Decision rendered April 2nd, 1873.

er for collection, or fail to apply such assessment, when collected, toward satisfying such execution, then, in either of the cases aforesaid, the directors shall be personally liable for the whole amount of said execution." *Held*, that "this is in the nature of a penal statute, inflicting upon the directors the penalty of personal liability for a failure to pay the execution in the case provided for, or to make and properly apply an assessment, as provided for. It must therefore be construed with some degree of strictness, and cannot be extended beyond the cases fairly within its terms in order to meet those that might be conceived to be within the spirit and object of the law. The legislature has provided the penal remedy against the directors only in cases where there has been a judgment against the corporation on a policy, and the courts cannot extend the remedy to cases where a judgment has been recovered on something else than a policy."

*Raber vs. Jones et al.\**

*Rep'd Jour'l* p. 519.

*Ind. S. C.*

### BANKRUPTCY.

§ 121. *LIFE.—Rights of Assignee—Husband and Wife.*—The wife of the petitioner in the year 1869 took out two policies upon her life, payable at her death to her husband. She paid three annual premiums out of her own separate estate, secured to her by an ante-nuptial marriage settlement, and died in 1872, before the premium for that year became due. In 1869, after the insurance was effected, the petitioner was adjudged a bankrupt. After the death of the wife the proceeds of the policies were paid to the assignee in bankruptcy. The petitioner asked that the amount of the insurance might be paid over by the assignee to him. *Held*, that "the husband at the time of his bankruptcy had no such interest in these policies as to give the assignee the right to retain their proceeds, as against the manifest intention and purpose of the wife." *Held*, also, that "the policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy, under such a contract, should by relation back to the time of commencement of proceedings in

\* Decision rendered February 7th, 1873.

bankruptcy be held to belong to the assignee. The design of such charitable acts for the benefit of a third person was not intended to be defeated by the bankrupt law, in a case like the present, when such a result would be against all equity."

*Murrin in the matter of Owen et al.\**

Rep'd Jour'l, p. 524.

U. S. C. C., E. Dist. Mo.

### CONSTRUCTION.

§ 122. **MARINE.**—*Lost or not Lost—Authority of Agent—Deviation—Waiver.*—The company issued, May 1st, 1868, to the plaintiffs, residing at Fort Smith, an open policy for one year, which stipulated that the company thereby caused the plaintiffs to be insured, lost or not lost. About the 1st of April, 1869, the plaintiffs ordered a lot of tobacco from Louisville, which was shipped to them at Fort Smith by steamboat. They received the invoice on Sunday, April 11th, and early the next morning reported the shipment to the agent of the company at Fort Smith, for the purpose of having the goods indorsed as insured under the policy from Memphis to Fort Smith. The agent indorsed the goods as so insured, charged the amount of the premiums to the plaintiffs, according to custom, and forwarded the report of the same to the secretary of the company at Little Rock, by whom it was received April 14th. The boat on the night of April 9th struck a snag, took fire, and burned, and the goods were totally destroyed. The loss was known to the company when the agent's report was received, but was not known to the agent or to the plaintiffs at the time the goods were indorsed as insured. The company afterward rejected the agent's report and cancelled the policy. *Held*, that "the insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, even if that loss be total, so that the subject matter of the insurance is then non-existent, and this intention is expressly evidenced by the clause 'lost or not lost' in the policy," and that the company are liable under the policy.

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\* Decision rendered April 2nd, 1873.

1 Arnould on Ins. p. 26 ; Marshall on Ins., 338-340 ; 1 Phillips on Ins., 72, 438 ; 3 Kent, (6th ed.,) 258, note C. ; 1 Phillips on Ins., 925 ; The City of Davenport vs. Peoria M. and F. Ins. Co., 17 Iowa, 276 ; Kelly vs. Commonwealth Ins. Co., 10 Bos., (N. Y.,) 82 ; Paddock vs. Franklin Ins. Co., 11 Pick., 227 ; Orient Mut. Ins. Co. vs. Wright, 23 How., (U. S.,) 401 ; Mark vs. Aetna Ins. Co., 29 Ind., 390 ; E. Carver Company vs. Manufacturer's Ins. Co., 6 Gray, 215.

*Held*, also, that the defendant is estopped, by the act of its agent, from any defense on the ground of deviation. The plaintiffs acted on the belief that the acts of the agent, who, knowing all the circumstances, indorsed the goods from Memphis instead of from Louisville, were the acts of the company, and they had a right to regard any objections on this ground as waived.

*Arkansas M. F. etc. Ins. Co. vs. Bostick et al.\**

Rep'd Jour'l p. 592.

ARK. S. C.

§ 123. FIRE.—*Premium Note—Parol Evidence and Written Contract.*—The plaintiff issued a policy upon the property of the defendant, and received from Burke, who transacted the business, a premium note signed "Daniel McCarthy, Pres't, per Thos. Burke." The application was designated in itself, "Application of Daniel McCarthy, president of St. Mary's Seminary." The number and date of the application, premium note and policy, were the same. The note referred to value received in the policy, and the policy referred to the execution of the note. The seminary, by its charter, was placed in charge of three officers, "Superior," "Assistant Superior," and "Procurator." At the time the insurance was obtained McCarthy was the procurator and acting superior, and the evidence tended to show that he had authorized Burke to apply for the insurance, sign the note, transmit the policy and pay assessments. *Held*, that "if there was any ambiguity in either the note or the policy of insurance, parol evidence was perfectly admissible for the purpose of affording an explanation thereof and of showing upon whom the liability arising from the execution of the note should rest, and for whose benefit the policy was designed to inure."

*Bank of Alexandria vs. Bank of Columbia*, 5 Wheat., 327 ; Commercial

\* Decision rendered December Term, 1872.

Bank vs. French, 21 Pick., 486; Smith vs. Alexander, 31 Mo., 193; Schuetze vs. Bailey, 40 Mo., 69; Musser vs. Johnson, 42 Mo., 74; McClellan vs. Reynolds, 49 Mo., 312.

*Held*, also, that to all intents and purposes the result is precisely the same as if the note, policy and application had all been written upon one and the same sheet of paper.

*The Washington Mut. Fire Ins. Co. vs. St. Mary's Seminary.\**

Rep'd Jour'l p. 530.

Mo. S. C.

§ 124. FIRE.—“*President*”—*Corporation and Agent*.—The plaintiff issued a policy upon the property of the defendant, and received from Burke, who transacted the business, a premium note signed “Daniel McCarthy, Pres’t, per Thos. Burke.” The application was designated in itself as “Application of Daniel McCarthy, president of St. Mary’s Seminary.” The seminary, by the terms of its charter, was placed in charge of three officers, “Superior,” “Assistant Superior,” and “Procurator.” At the time of making the application and note McCarthy was the procurator and acting superior, and the evidence tended to show that he had authorized Burke to apply for the insurance, sign the note, transmit the policy and pay assessments. *Held*, that Burke was fully empowered to give the note and effect the insurance for the defendant, and that McCarthy had full power to authorize him to act as he did. “No proof of any special authority was required. The doctrine has long since been justly exploded that every act to be performed by the agent of a corporation had to be authenticated by its corporate seal.”

Union M’fg Co. vs. Pitkin, 14 Conn., 174; Western Bank of Missouri vs. Gilstrap, 45 Mo., 419.

*Held*, also, that the term Superior was tantamount to that of President, and meant the same thing. “Once establish the fact, as the evidence amply does in this case, that a given person holds certain official relations toward a corporation, and is in the active exercise, for a series of years, of powers, and engaged in the performance of duties usually incident to such official position, and it matters little whether he is called superior or president.”

*The Washington Mut. Fire Ins. Co. vs. St. Mary's Seminary.*

—4 123.

\* Decision rendered May 7th, 1873.

§ 125. ACCIDENT.—“*Traveling by Public or Private Conveyance.*”—The company agreed to pay the legal representatives of the assured the sum of \$5,000.00 in event of his death from injuries effected through violent and accidental means, provided the death was caused by an accident while he was “traveling by public or private conveyance.” The assured, in returning from abroad, proceeded by steamboat to a village about eight miles from his residence, from which place he started to walk home, and on the way received injuries by violence, from the effects of which he died soon afterward. *Held*, that “the contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or rather what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, traveling within the terms of the policy. There is nothing to show that it was not.”

*Ripley et al. vs. The Railway Pass. Assur. Co.\**

*Rep'd Jour'l p. 538.*

U. S. S. C.

## MARRIAGE.

§ 126. LIFE.—*Evidence of—Insurable Interest.*—The company issued a policy to the plaintiff upon the life of her husband. The policy stated that it was made in consideration of the representations in the application and of the premiums paid by the plaintiff, the assured under the policy, and provided that if within seven years of the issue thereof the declarations made by her, and upon the faith of which the policy was issued, should be found in any respect untrue, the policy should be null and void. Before the death of the husband the company notified him and the plaintiff that the statements in the declaration were untrue, and that the policy had for that reason been cancelled. The

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\* Decision rendered April 28th, 1873.

company claimed on trial that the policy was procured by fraud, and, among other things, that the plaintiff was not the wife of the deceased, as stated in the declaration, and therefore had no insurable interest in his life. *Held*, that "under the issues in this case the plaintiff must prove that at the date of the policy sued on she was the lawful wife of O. F. Holabird, the person on whose life the risk was taken." *Held*, also, that "it is not necessary to the validity of a marriage in Missouri that any special ceremony, religious or otherwise, should be performed, nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual present consent of two competent persons made in good faith and followed by co-habitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists."

*Holabird vs. The Atlantic Mut. Life Ins. Co.*

—§ 112.

## POLICY.

§ 127. MARINE.—*Written and Verbal Contract—Fraudulent Concealment.*—The defendant issued a policy on the 15th of January, insuring the plaintiffs' brig for two months from the 1st of January, the date of the expiration of a former policy. The plaintiffs, at the time they applied for the policy, knew of the loss of the vessel, which had happened after the expiration of the former policy, but did not inform the company of the fact. The plaintiffs claimed that they made a verbal contract with the company on the 31st of December to renew the insurance. *Held*, that the company, when it came to make the policy, was entitled to the information the plaintiffs had of the loss of the vessel, and that "no action could be sustained on the policy, and that in point of fact the taking of such a policy and causing the defendant to sign it, under such circumstances, was a fraud." *Held*, also, that "the terms of the contract having been reduced to writing—signed by one party and accepted by the other at the time the premium of insurance was paid—neither party can abandon that instrument as of no value in ascertaining what the

contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement. And it is hardly necessary to say that the party who has destroyed the validity of that contract by his own fraud, cannot for *that reason* treat it as if it had never been made and recover on the verbal statements made before its execution."

*The Merchants' Mutual Ins. Co. vs. Lyman.\**

Reg'd Jour'l p. 516.

U. S. S. O.

§ 128. MARINE.—*Avoidance of*—"Protection Purposes"—*Waiver by Agent*.—The defendant issued to the plaintiffs an open policy for one year upon goods lost or not lost. The policy provided that the agent should report applications to the home office "for entry on the office records and for protection purposes." After the loss of the goods, which was not known to the plaintiffs or the agent, the agent indorsed the goods upon the policy and sent the report or application to the home office. The loss was known to the company when the agent's report was received. The company rejected the report and cancelled the policy. The company also claimed that the policy was rendered void by the act of the plaintiffs in not reporting for insurance all goods consigned to them. *Held*, that the words "protection purposes" cannot be construed to mean that the company might receive or refuse the application upon its arrival. *Held*, also, that even if it was the duty of the plaintiff under the policy to report for insurance all goods shipped to them, their failure to do so would not work a forfeiture of the policy unless such were the express terms of that instrument, and that the act of the company's agent in insuring this shipment must be considered a waiver of any dereliction so far as the insurance of these goods is concerned.

*Arkansas M. F. etc. Ins. Co. vs. Bostick et al.*

—§ 122.

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\* Decision rendered April 28th, 1873.



## PLEADING.

§ 129. FIRE.—*Declaring upon Statute—Arrest of Judgment.*—The action was brought against the directors of an insurance company on an execution upon a note. The statute under which the action was brought provided that the directors of an insurance company should, in certain cases, be liable on an execution upon a policy. On trial, the court below sustained the defendants' motion in arrest of judgment, because the complaint did not state facts sufficient to constitute a cause of action, and judgment was then rendered that the plaintiff take nothing by his writ, and that the defendants recover of him their costs. *Held*, that "it is a clear principle of pleading that in declaring upon a statute the averments must be sufficient to bring the case within the statute. The complaint was, therefore, radically defective in not stating facts sufficient to constitute a cause of action, and the court properly arrested the judgment. When the judgment was arrested, however, there should have been an end of the case. No judgment for the defendant should have followed."

*Raber vs. Jones et al.*

—1120.

## PRACTICE.

§ 130. FIRE.—*Bankruptcy—Writ of Error and Mandamus.*—Creditors of the company filed a petition in the United States District Court, charging acts of bankruptcy and of fraudulent preference to creditors, and asking that the company, the respondents, be declared a bankrupt. On return day the company demanded in writing a trial by jury, and the jury, under instructions, found the company guilty as alleged in the petition. The respondents filed exceptions to the rulings and instructions of the court, and sued out a writ of error to the Circuit Court, but the Circuit Court dismissed the writ for want of jurisdiction, holding that a writ of error will not lie in such a case to remove the record from the District Court into the Circuit for re-examination. *Held*, that "the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and re-

gulations prescribed in the trial of civil actions at common law," and that "it is clear beyond doubt that the Circuit Court erred in dismissing the writ of error for want of jurisdiction, as it was the right of the excepting party to have the questions, if duly presented in the bill of exceptions, re-examined by the Circuit Court." *Held*, also, that "it is quite clear that the respondents, had they petitioned this court for a mandamus instead of suing out a writ of error, would be entitled to a remedy in some one of the forms in which a remedy is granted in such a case." *Held*, also, that "mandamus being the proper remedy, error will not lie."

*Ayers vs. Carver*, 17 How., 591.

*The Knickerbocker Ins. Co. vs. Comstock et al.\**

*Rep'd Jour'l*, p. 582.

U. S. S. C.

#### SUICIDE.

§ 131. LIFE.—*Insanity—Construction*—"Die by his own Hand."—The company issued a policy to the plaintiff upon the life of her husband. The policy provided that "if the said person whose life is hereby insured \* \* \* shall die by his own hand \* \* \* this policy shall be null and void." The husband destroyed his life by taking poison. *Held*, that the rule is that "if the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." *Held*, also, that there is no difference in the expressions "commit suicide," "take his own life," and "die by his own hand."

*The Mutual Life Ins. Co., of New York, vs. Terry.†*

*Rep'd Jour'l* p. 540.

U. S. S. C.

\* Decision rendered , 1873.

† Decision rendered April 28th, 1873.

## SEAWORTHINESS.

§ 132. MARINE.—*Voyage and Time Policies—Warranty.*—The defendant, on the first day of April, issued a valued policy upon the plaintiffs' vessel and furniture, while in harbor, from noon of that day to noon of the 30th day of the next November. The policy contained an express warranty that she was then in safety, and that she was to be employed in the freighting and passenger business, and was to navigate only the waters and tributaries of the lakes and the river St. Lawrence. Among the perils insured against were fires, and among those mentioned as excepted were, besides "other legally excluded causes," rottenness, inherent defects, overloading, and all other unseaworthiness. The vessel remained in port, after the policy was issued, until the 10th of April, when she made her first voyage, and continued in the lumber trade until the 8th of the next October, upon which day she was destroyed, while lying at the dock, by a fire which was not the result of unseaworthiness. *Held*, that it is a peculiar rule of the law merchant and the common law that every voyage policy implies a warranty of seaworthiness, and this warranty relates to the beginning of the risk.

2 Greenleaf Ev., § 400 ; 3 Kent's Com., 289.

*Held*, also, that "seaworthiness at the commencement of the voyage is a condition precedent, and if it does not then exist, the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause."

Prescott vs. Union Ins. Co., 1 Whart., 399 ; Starbuck vs. N. E. Ins. Co., 19 Pick., 199 ; Capen vs. Washington Ins. Co., 12 Cush., 517.

*Held*, also, that "these are inflexible, arbitrary rules of the common law, and are as applicable to risks of that character upon our lakes as upon the high seas." *Held*, further, that these rules do not apply to time policies.

Capen vs. Washington Ins. Co., 12 Cush., 517 ; Gibson vs. Small, 24 Eng. L. and Eq., 27 ; Thompson vs. Hopper, 6 El. & Bl., 172, 34 Eng. L. and Eq., 266 ; Jones vs. Ins. Co., 2 Wallace Jr. C. C., 278.

*Held*, also, that this policy is substantially different from the usual voyage policy, and that the vessel-owner, if insurance compa-

nies choose to concur in his wishes, has the legal right to adopt the substitute and enjoy it, if fairly obtained, untrammelled with the incident which the law attaches to a voyage policy.

*Merchants Ins. Co., of Chicago, vs. Morrison.\**

Rep'd Jour'l p. 497.

ILL. S. C.

§ 133. MARINE.—*Warranty—Time Policy.*—The defendant, on the first day of April, issued a valued policy upon the plaintiff's vessel and furniture, while in harbor, from noon of that day to noon of the 30th day of the next November. The policy contained an express warranty that she was then in safety, and that she was to be employed in the freighting and passenger business, and was to navigate only the waters and tributaries of the lakes, and the river St. Lawrence. Among the perils insured against were fires, and among those mentioned as excepted were, besides "other legally excluded causes," rottenness, inherent defects, overloading, and all other unseaworthiness. The vessel remained in port after the policy was issued until the 10th of April, when she made her first voyage and continued in the lumber trade until the 8th of the next October, upon which day she was destroyed, while lying at the dock, by a fire, which was not the result of unseaworthiness. *Held*, that the peculiar rule of the law merchant and the common law that every voyage policy implies a warranty of seaworthiness and that seaworthiness at the commencement of the voyage is a condition precedent, and that if it does not then exist, the policy is void and the insurers are not responsible for a subsequent loss, even if it arises from another cause, does not apply to time policies. *Held*, also, that under the circumstances the law does not imply a warranty that the vessel should be seaworthy when she set out upon her first voyage from that port, and that it was not "requisite that she was seaworthy at that time, in the sense of that term as applied to voyage policies, in order to make the policy attach, and charge the insurer for a subsequent loss by fire not arising from want of seaworthiness."

*Merchants Ins. Co., of Chicago, vs. Morrison.*

—4 122.

\* Decision rendered February 7th, 1873.

## STOCK.

§ 134. FIRE.—*Avoidance of Assessment—Violation of Amendment of Charter.*—The defendant, a citizen and resident of Indiana, subscribed to the capital stock of the insurance company, a corporation organized in Illinois. By the terms of the charter and the conditions of the subscription, twenty per cent. was to be paid in cash and the remaining eighty per cent. in case losses rendered its payment necessary. By its losses the company became insolvent, and a decree of bankruptcy was rendered against it, the court making an assessment of sixty dollars on each share of the stock. The original charter of the company provided that the capital stock should be \$1,000,000.00, which might be increased not to exceed \$5,000,000.00, at the discretion of the stockholders. The board of directors, before the defendant subscribed to his stock, passed a resolution to increase the capital stock to \$5,000,000.00, to which increase the stockholders never consented. The stock issued to the defendant was in excess of the \$1,000,000.00 authorized by the original charter, and at the time of subscribing he had knowledge of the manner in which the stock had been increased. After the defendant had subscribed, an amendment to the charter was passed by the legislature, which provided that the board of directors should have power to increase the capital stock, from time to time, in their discretion, and the directors afterward affirmed their previous action in increasing the capital stock. The defendant did not, after the amendment, repudiate his membership as a stockholder, but retained his certificate of stock, took part in the election of directors, and received dividends. *Held*, that the change in the capital stock before the amendment of the charter was not of such a character as to authorize the defendant to declare his obligation for his stock at an end, and that however that might be, the acts of the directors and of the defendant after the amendment estop him from setting up the change as a defense.

*Payson, assignee, vs. Withers.\**  
Rep'd Jour'l p. 599.

U. S. C. C., DIST. IND.

§ 135. FIRE.—*Avoidance of Assessment—Misrepresentation of*

\* Decision rendered May Term, 1873.

*Agent.*—The defendant, a citizen and resident of Indiana, subscribed to ten shares of the stock of the insurance company, a corporation organized in Illinois, for which a certificate was issued to him. By the terms of the charter and the conditions of the subscription, twenty per cent. was to be paid in cash at the time of subscribing, and the remaining eighty per cent. in case losses rendered its payment necessary. The subscription was made in Indiana with the agent of the company. By its losses the company became insolvent and a decree of bankruptcy was rendered against it, the court making an assessment of sixty dollars on each share of the stock. The defendant claimed that he was ignorant of the condition of the company, and that he relied upon the representations of the agent and upon his statement that no more than twenty per cent. would ever be assessed against him. *Held*, that this defense cannot avail against the terms of the charter agreed to in writing.

*Payson, assignee, vs. Withers.*

— § 134.

§ 136. FIRE.—*Avoidance of Assessment—Construction of Statute.*—The defendant, a citizen and resident of Indiana, subscribed to the stock of the insurance company, a corporation organized under the laws of Illinois. By the terms of the charter and the conditions of the subscription, twenty per cent. was to be paid in cash at the time of subscribing, and the remaining eighty per cent. in case losses rendered the payment necessary. The statute of Indiana required that agents of insurance companies not organized in that State, should, before entering upon their duties in that State, deposit in the office of the county clerk a copy of their commission or appointment from the company, together with certain other papers, and declared that no such company should enforce any contract made by their agents until there had been a compliance with the law. The fifth section declared what acts should constitute a person an agent of such a company, and the sixth provided that the fifth should not apply to persons acting as agents for foreign companies for a specific or temporary purpose, or for a purpose not within the ordinary business of such corporations. The defendant's subscription was made in Indiana with an agent of the company,

who had not deposited the papers mentioned in the statute. On account of losses, an assessment of sixty dollars per share was made upon the defendant's stock. The defendant claimed that the agent's acts were unlawful, and that the contract for the stock was void. *Held*, that the ordinary business done by the company was an insurance business, and that the law does not, by a fair and reasonable construction of its language, prohibit such a contract as this.

*Payson, assignee, vs. Withers.*

—§ 124.

§ 137. FIRE.—*Avoidance of Assessment—Amendment of Charter.*—The defendant, a citizen and resident of Indiana, subscribed to ten shares of the stock of the insurance company, a corporation organized in Illinois. By the terms of the charter and the conditions of the subscription, twenty per cent. was to be paid in cash and the remaining eighty per cent. in case losses rendered its payment necessary. By its losses the company became insolvent and a decree of bankruptcy was rendered against it, the court making an assessment of sixty dollars on each share of the stock. The original charter of the company provided that the capital stock should be \$1,000,000.00, which might be increased not to exceed \$5,000,000.00, at the discretion of the stockholders. It also provided that certain notice should be given to each stockholder, of the election of directors, and that the election should be by ballot by a majority of the stock, allowing one vote for each share. After the defendant had subscribed to the stock, an amendment to the charter was passed by the legislature, which provided that the board of directors should have power to increase the capital stock from time to time in their discretion. The amendment also provided that the stockholders residing in any town or city might at any annual meeting elect such number of the directors as they might be entitled to by the by-laws of the corporation. *Held*, that there was "no such change, by this amendment, in the original terms of the law, as to authorize a subscriber to the stock to declare his agreement of subscription at an end and his release from its obligations."

*Payson, assignee, vs. Withers.*

—§ 124.

# REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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## UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

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*In Error to the Circuit Court of the United States for the District of  
Kansas.*

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THE MUTUAL LIFE INS. CO., OF NEW YORK, *Plaintiff in Error,*

vs.

MARY TERRY.\*

[Continued from July Number, page 544.]

In *Dean vs. Mutual Life Ins. Co.*, 4 Allen, 96, the courts of Massachusetts held substantially the doctrine of *Borrodaile vs. Hunter*. In Kentucky, in *St. Louis L. Ins. Co. vs. Graves*, 6 Bush., 268, the court was divided upon the question of the soundness of *Borrodaile vs. Hunter*, but held unanimously that where the suicide was committed during an uncontrollable passion caused by intoxication, the condition was broken and the policy avoided. In *Cooper vs. Mass. L. Ins. Co.*, 102 Mass. R., 227, the doctrine of *Dean vs. Am. Life Ins. Co.* was reaffirmed, the plaintiff offering to prove that the deceased was insane at the time he committed the act; that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of his insanity.

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\* Decision rendered April 26th, 1873.



In *Nimick vs. Ins. Co.*, 10 Am. L. Reg., 102, McKennan, Circuit J. U. S. Western District Penn., held that if the assured comprehended the physical nature and consequences of the act, and intended to destroy his life, the policy was void, although he did not comprehend the moral nature of the act.

On the other hand, in *Eastabrook vs. Union Ins. Co.*, 54 Maine, 224, the judge at the trial instructed the jury "that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be entitled to recover." This decision was sustained by the Supreme Court of the State of Maine.

In the State of New York the question arose in *Breasted vs. Farmers' Loan and Trust Co.*, 4 Hill, 73. In an action upon the policy the defendants pleaded that the deceased committed suicide by drowning himself in the Hudson River, and he died by his own hand. To this the plaintiff replied that the assured was of unsound mind and wholly unconscious of the act. The defendants demurred. The Supreme Court overruled the demurrer, holding that the reply afforded a sufficient answer to the plea.

The case afterward came before the Court of Appeals of that State, (4 Seld., 299,) when it was held that the provision in the policy had reference to a criminal act of self-destruction; that the self-destruction of the insured while insane, and incapable of discerning between right and wrong, was not within the provision.

In the case of *Gay vs. The Union M. Life Ins. Co.*, cited 2 Bigelow, sup., p. 280, it was held that if the deceased was conscious of the act he was committing—if he intended to take his own life, and was capable of understanding the nature and consequences of it—the policy was void; but if the insured destroyed himself while acting under an insane delusion, which overpowered his understanding and will, or if he was impelled to the act by an uncontrollable impulse, the case did not fall within the proviso of the policy. This decision, it is stated by Bigelow, sup., was the result of a careful deliberation between Judges Woodruff and Shipman at a Circuit Court of the United States held by them jointly.

In his work on insurance, Mr. Phillips, after citing the cases, closes thus: "And I take our law to be that any mental derangement which would be sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under this condition." Phil. on Ins., sec. 895.

There is a conflict in the authorities which cannot be reconciled.

The propositions embodied in the charge before us are in some re-

spects different from each other, but in principle they are identical. They rest upon the same basis—the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power nor capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis, that the act was not the voluntary intelligent act of the deceased.

The causes of insanity are as varied as the varying circumstances of man.

———“Some for love, some for jealousy,  
For grim religion some, and some for pride,  
Have lost their reason ; some for fear of want,  
Want all their lives ; and others every day,  
For fear of dying, suffer worse than death.”

[*Armstrong on Health*, book 4, v. 84. Cited, Shelf. Lun., In. 1, 43.]

When we speak of the “mental” condition of a person we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding, are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective.

Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the functions become impaired and diminished, the visions, delusions and mania which accompany irritability, or the weakness which results from an excess of vital functions, indigestion and sleeplessness, are all the result of a disturbance of the physical system. The intellect and intelligence of man are manifested through the organs of the brain, and from these consciousness, will, memory, judgment, thought, volition and passion, the functions of the mind, do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished.

We have not before us the particular facts on which the questions of the sanity of Terry were presented. We may assume that proof was given upon which the propositions of the charge were based. We

do not know whether he was sleepless, unduly excited, or unnaturally depressed ; whether he had abandoned his accustomed habits and pursuits and adopted new and unusual ones ; from a quiet, orderly man, had he become disorderly, vicious or licentious ; that his fondness for his wife and children changed to dislike and abuse ; that jealousy, pride, the fear of want, the fear of death, had overtaken him. He may have realized the state supposed by the counsel in arguing *Borrodaile vs. Hunter*, viz., that his death might have resulted from an act committed under the influence of delirium, or that in a paroxysm of fever he might have precipitated himself from a window, or, having been bled, he might have torn away the bandages. Whether he swallowed poison or did the other insane acts, might result from the same condition of body and mind.

Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these or other forms overthrew Terry's reasoning faculties, in other words, destroyed his consciousness, his judgment, his volition, his will, he remained the form of the man only. The reflecting, responsible being, did not exist. In the language of the successful counsel in *Borrodaile vs. Hunter*, "in these and many other cases, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into."

That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers on this subject. It is sometimes accompanied by delusions and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form—breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders and suicides. The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion, merely, in the same direction. (See Blandford on Insanity—"Impulsive Insanity.")

Dr. Ray, cited by Fisher, approves the charge of the judge in Haskell's case, where he says : "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?"—(Fisher on Insanity, p. 83.)

The question of sanity has usually been presented upon the validi-

ty of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then, made by him, would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offense, upon all the authorities he would have been entitled to a charge, that upon proof of the facts assumed, the jury must acquit him. (*Freeman vs. People*, 4 Denio, 9 ; *Willis vs. The People*, 32 N. Y., 719 ; *Seamen's Friend So. vs. Hopper*, 33 N. Y., 619 ; *The Marquis of Winchester's case*, 6 Coke R., 23 ; *Combe's case*, *Moore R.*, 759.)

We think a similar principle must control the present case, although the standard may be different.

We hold the rule on the question before us to be this : If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the present instance the contract of insurance was made between Mrs. Terry and the company, the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, commit suicide, take his own life, or die by his own hands. With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso.

The judgment must be affirmed.

Dissenting, Mr. Justice STRONG.

## UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

*In Error to the Circuit Court of the United States for the Northern  
District of Illinois.*

THE KNICKERBOCKER INS. CO., OF CHICAGO, *Pl'ffs in Error,*

vs.

GARDNER P. COMSTOCK, JAMES BRAGLEY, LAWRISTON  
PATTERSON, JOHN ALLEN, AND B. PALMER MACKEY.\*

Moneyed, business and commercial corporations are as much within the provisions of the bankrupt act as unincorporated individuals or associations, and all provisions forbidding preferences and fraudulent conveyances apply to them.

Creditors of the company, the respondents, filed a petition in the United States District Court, charging acts of bankruptcy and of fraudulent preference to creditors, and asking that the company be declared a bankrupt. On trial in that court the company demanded in writing a trial by jury, and the jury, under instructions, found the company guilty as alleged in the petition.

The respondents filed exceptions to the rulings and instructions of the court, and sued out a writ of error to the Circuit Court, but the Circuit Court dismissed the writ for a want of jurisdiction, holding that a writ of error will not lie in such a case to remove the record from the District Court into the Circuit Court for re-examination.

*Held*, that the process, pleadings and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law.

The Circuit Court erred in dismissing the writ of error for want of jurisdiction, as it was the right of the excepting party to have the questions re-examined by the Circuit Court.

This court will not determine the questions presented in the bill of exceptions until they have first been passed upon by the Circuit Court.

Had the respondents petitioned this court for a mandamus, instead of suing out a writ of error, they would have been entitled to the remedy granted in such a case. Mandamus being the proper remedy, error will not lie. Writ of error dismissed.

Mr. Justice CLIFFORD delivered the opinion of the court.

\* Decision rendered \* \* \* \* \*, 1873.

Moneyed, business and commercial corporations are as much within the provisions of the bankrupt act as unincorporated individuals or associations, and all the provisions of the act forbidding preferences and fraudulent conveyances are as applicable to such debtors, if insolvent, as to any other insolvent debtors falling within those provisions, and the same acts which render individual debtors liable to be adjudged bankrupts on the petition of their creditors, if committed by such a corporation which is insolvent, will warrant the creditors of the same to institute proceedings for that purpose against such debtors, and to claim that they be adjudged bankrupts for the same reasons.

On the fifth of January, 1872, certain creditors of the said company presented their petition to the District Court of the district aforesaid, representing that the company owed debts to an amount exceeding three hundred dollars, and that their respective demands against the company exceeded two hundred and fifty dollars, and that the company within six months next before the filing of the petition, being then and there insolvent or in contemplation of insolvency, made sundry payments of money to certain of their creditors in satisfaction of their claims with a view to give a preference to such creditors having such claims, and well knowing that the said company was insolvent.

They also represented that the said company within the said six months, being then and there bankrupt or in contemplation of bankruptcy, made divers payments of money, sales, conveyances and assignments of property, mortgages, and other effects to various persons within the district, with intent and for the purpose of giving such persons a fraudulent preference over other creditors of the company, and for the purpose of preventing the assets of the company from being administered under the bankrupt act.

Based on these representations the prayer of the petition is that the company may be declared a bankrupt, and that a warrant may issue to take possession of the estate of the company. On the return day for hearing the petition, the corporation respondents appeared and denied that they had committed the acts of bankruptcy set forth in the petition, and demanded in writing a trial by jury pursuant to the provisions in such case made and provided. 14 Stat. at Large, 537.

Subsequently other creditors were permitted to appear as petitioners, and the pleadings having been concluded, the parties went to trial, and the jury, under the instructions of the court, found the respondents guilty as alleged in the petition. Exceptions were duly

filed by the respondents to the rulings and instructions of the court, and they sued out a writ of error and removed the cause into the Circuit Court for the same district.

Suffice it to say in respect to the exceptions, that they embrace not only material rulings and the instructions of the court given to the jury, but also the decisions of the court in refusing to instruct the jury as requested by the respondents.

Errors were duly assigned by the respondents in the Circuit Court, but the Circuit Court dismissed the writ of error for want of jurisdiction, holding that a writ of error will not lie in such a case to remove the record from the District Court into the Circuit Court for re-examination. Jurisdiction, it was insisted by the respondents, did exist in the Circuit Court to re-examine such a case under a writ of error to the District Court which rendered the judgment, and they sued out a writ of error to the Circuit Court and removed the cause into this court.

Writs of error may be allowed from the Circuit Courts to the District Courts in cases at law, and appeals may be taken from the District Courts to the Circuit Courts in certain cases, under the jurisdiction created by the bankrupt act, when the debt or damages claimed amount to more than five hundred dollars, but the provision is that no appeal shall be allowed from the District to the Circuit Court unless it is claimed and the required notices are given within ten days after the entry of the decree or decision from which the appeal is taken, and that no writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

Applicants for an appeal must give bond as required under the act "amend the judicial system," and the party claiming a writ of error must also give good and sufficient security to prosecute the writ to effect, and must comply with the regulations contained in the judiciary act as to the service of the writ and the required notice to the adverse party.

Taken literally, the ten days' limitation does not extend to writs of error, but the better opinion is, in view of the fact that writs of error and appeals are associated together in the first clause of the section, that the word appeal at the commencement of the second clause means the same as review or revision, and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the Appellate Court than that prescribed in the judiciary act or the act to amend the judiciary system. 14 Stat. at Large, 520; *Morgan vs.*

Thornhill, 11 Wall., 75 ; 1 Stat. at Large, 85 ; 2 Stat. at Large, 244. Grant all that, and still it is insisted that a writ of error from the Circuit Court to the District Court will not lie in a case like the present, as neither the process nor proceeding is in form an action at law or a suit in equity, which must be admitted, confining the admission strictly to the matter of form. Even when so confined it may be doubtful whether the admission ought not to be further qualified, as the first pleading of the moving party is quite as analogous to the writ and declaration at common law as the petition now employed as a substitute for the common law declaration in more than half of the State courts, and which, under the recent act to further the administration of justice, may be employed in the Federal courts. 17 Stat. at Large, 196.

Support to that view is also derived from the first pleading of the respondents, which is in substance and effect the same as the first pleading of the claimant in an information based upon a seizure on land, where it is required that the case shall be tried by jury, unless the right is waived by the consent of the claimant.

Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the District Courts, but the forty-first section of the bankrupt act expressly provides that the court shall, if the debtor, on the return day, or day of hearing, "so demand in writing," order a trial by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the alleged fact of such alleged bankruptcy.

Regulations are also enacted as to the matters open to inquiry and the course of the trial, as follows : That if upon such hearing or trial the debtor proves to the satisfaction of the court "when the hearing is summary, or of the jury, if one is demanded," that the facts set forth in the petition are not true, or that he, the debtor, has paid and satisfied all liens upon his property, in case the existence of such liens is the sole ground of the petition, the proceeding shall be dismissed and the respondent shall recover costs. 14 Stat. at Large, 537.

Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution, and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law.



Congress, it must be assumed, in conceding to the debtor the right to demand a trial of the issue by a jury, intended to confer a right of some value, which would be converted into a mockery if the judge presiding over the trial may exclude by his rulings all the evidence which the debtor offers, to disprove the charges set forth in the petition, and he, the debtor, be left without any power to resort to an appellate tribunal to correct the errors committed by the Bankrupt Court.

Cases of the kind, when tried by a jury, if the Circuit Court has any jurisdiction upon the subject, must be removed into that court by a writ of error, as when tried by a jury the case is excluded from the special jurisdiction conferred in the first clause of the second section of the act by the very words of the clause. Where "special provision" is otherwise made, the case is excluded from the general superintendence and jurisdiction of the Circuit Court by the exception introduced, as a parenthesis, into the body of that part of the section. *Morgan vs. Thornhill*, 11 Wall., 79.

Decrees in equity rendered in the District Court, it may be admitted, might be revised in the Circuit Court in a summary way if Congress should so provide by law, but it is clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the Circuit Court in that way, as the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law."

Two modes only were known to the common law to re-examine such facts, to wit, the granting of a new trial by the court where the issue was tried or to which the record was returnable, or, secondly, by the award of *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. 2 Story on Const. (3rd ed.,) 584; *Parsons vs. Bedford et al.*, 3 Pet., 448; *Knight vs. Cheney*, 5 N. B. R., 317.

All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted. *U. S. vs. Wonson*, 1 Gall., 20.

Apply these rules to the case before the court, and it is clear be-

yond doubt that the Circuit Court erred in dismissing the writ of error for the want of jurisdiction, as it was the right of the excepting party to have the questions, if duly presented in the bill of exceptions, re-examined by the Circuit Court, which leaves nothing further open for decision except the question what disposition shall be made of the case, and what direction, if any, shall be given to the subordinate court. Appellate courts under such circumstances do not determine the questions presented in the bill of exceptions filed in the District Court, as those questions have not been re-examined in the Circuit Court, and this court is not inclined to re-examine any such questions coming up from the District Court until they have first been passed upon by the Circuit Court. Consequently, the question whether a writ of error will lie from this court to the Circuit Court to re-examine the rulings of the Circuit Court in a case removed into that court from the District Court, in such a case as the one under consideration, does not arise, as the record shows that the Circuit Court never passed upon the questions as to the correctness or incorrectness of the rulings of the District Court.

Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate federal court to decide a pending cause. *Marbury vs. Madison*, 1 Cran., 175 ; *Kendall vs. U. S.*, 12 Pet., 622.

Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law ; and in the case of *Ex parte Bradstreet*, 7 Pet., 647, this court decided, Marshall, Ch. J., giving the opinion of the court, that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of two thousand dollars, and that the court in such case will issue the writ to a Circuit Court or a District Court exercising Circuit Court powers, in a case where the subordinate court had improperly dismissed the case, requiring the court to reinstate the case and to proceed to try and adjudge the issues between the parties.

Examined, as the case must be, in the light of these authorities, it is quite clear that the respondents, had they petitioned this court for a mandamus, instead of suing out a writ of error, would be entitled to a remedy in some one of the forms in which a remedy is granted

in such a case, but it is not doubted that the present decision will be in practice equally effectual to that end, as it is entirely competent for the Circuit Court, under the circumstances, to grant a rehearing and reinstate the case, and to proceed and decide the questions presented in the bill of exceptions.

Mandamus being the proper remedy, error will not lie. *Ayres vs. Carver*, 17 How., 591.

Decree that the writ of error be dismissed for want of jurisdiction.

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UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF MISSOURI

MARCH TERM, 1873.

CARRIE HOLABIRD, *Plaintiff*,

vs.

THE ATLANTIC MUT. LIFE INS. CO., *Defendant*.\* }

The defendant issued a policy to the plaintiff upon the life of her husband. The policy stated that it was made in consideration of the representations in the application and of the premiums paid by the plaintiff, and provided that if within seven years of the issue thereof the declaration made by her, and upon the faith of which the policy was issued, should be found in any respect untrue, the policy should be null and void.

Before the death of the husband the defendant notified him and the plaintiff that the statements in the declaration were untrue, and that the policy had, for that reason, been cancelled. The defendant claimed on trial that the plaintiff was not the wife of the deceased, as stated in the declaration, and therefore had no insurable interest in his life, and that the statements in the declaration in regard to his health and freedom from disease were false.

Under the issues in this case the plaintiff must prove that at the date of the policy she was the lawful wife of the person on whose life the risk was taken.

It is not necessary to the validity of a marriage in Missouri that any special ceremony should be performed, or that the marriage should be solemnized before any person belonging to any one of the classes named in the statute as authorized to perform the ceremony. Marriage may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be proved by habit and repute, if the evidence thereof satisfies the jury that the

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\* Decision rendered April 2nd, 1873.

parties had mutually agreed to become husband and wife in good faith, and cohabited thereafter as such.

It is immaterial whether the declarations contained in the application, if untrue, were intentionally so or not, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death.

As the declarations are presumed to be true, the burden of proving them untrue is upon the defendant, who controverts them.

The jury may, under the statute, if they are satisfied that the defendant has vexatiously refused to pay the loss in this case, add a sum not exceeding ten per cent. of the amount of the loss. Verdict for the plaintiff, with damages for vexatious delay.

This was an action on a policy of insurance for \$10,000.00, issued October 22nd, 1868, by the defendant to the plaintiff, Carrie Holabird, upon the life of O. F. Holabird, her husband, in consideration of the representations made in the application, and of the amount of the premiums paid by Carrie Holabird, the assured. The policy provided that if within seven years from the date of the issue thereof, the declaration made by her, and upon the faith of which the policy was issued, should be found in any respect untrue, then, and in such case, the policy should be null and void. Before the death of O. F. Holabird, which occurred February 16th, 1870, the company notified him and the plaintiff that the statements in the application were untrue, and that the policy had for that reason been cancelled. The defendant claimed, on trial, that the policy was procured by fraud, and, among other things, that the plaintiff was not at the time the policy was issued the wife of the deceased, as stated in the declaration, and therefore had no insurable interest in his life, and that the statements in the declaration in regard to his health and freedom from disease were false.

KRUM & PATRICK AND B. A. HILL, *for Plaintiff.*

J. T. TATUM AND W. H. HORNER, *for Defendant.*

TREAT, J.

*Gentlemen of the Jury:* Under the issues in this case the plaintiff must prove that at the date of the policy sued on she was the lawful wife of O. F. Holabird, the person on whose life the risk was taken. If at the time of the marriage ceremony, in May, 1861, testified to by plaintiff, the said O. F. Holabird had a wife living, then said alleged marriage with the plaintiff was void, and the plaintiff could not be, or become the lawful wife of said O. F. Holabird during the lifetime of his former wife.

By the statutes of Missouri, marriage is declared to be "a civil contract, to which the consent of the parties capable in law of contracting is essential." If subsequent to the death of the former wife, were there one, Mr. Holabird and plaintiff (being over 21 years of age) were married, and that marriage was prior to the date of the policy, and they continued to live together as husband and wife until the policy was issued, then she, as his wife, had an insurable interest in his life. It is not necessary to the validity of a marriage in Missouri that any special ceremony, religious or otherwise, should be performed; nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. And such is substantially the law in Tennessee and Illinois so far as the same affects this case. Therefore, should the jury believe from the evidence that at the date of the marriage ceremony with the plaintiff, in May, 1861, Mr. Holabird had another wife living, yet should they further believe from the evidence that such former wife died in 1863, and if they further believe from the evidence that afterward, in the State of Missouri, Tennessee or Illinois, the plaintiff and Mr. Holabird agreed by mutual present consent, given in good faith, to become husband and wife, and cohabited as such thereafter, then from the date of said mutual consent she was his wife.

The attention of the jury is directed to the difference between a mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife. The subsequent marriage may be proved by habit and repute if the evidence thereof satisfies the jury that the parties had mutually agreed to become husband and wife, in good faith, and cohabited thereafter as such. If at the date of the marriage ceremony between O. F. Holabird and the plaintiff in May, 1861, said O. F. Holabird did not have another wife living, then the plaintiff became his lawful wife at that time.

The defendant seeks to avoid the policy by showing that those declarations contained in the application which are specified in the answer filed in this case, were, or some one of them was, in some respect untrue at the time when made. By the terms of the contract, if any one of the said declarations is found to have been in any re-

spect untrue at the time when made, then the plaintiff cannot recover. It is immaterial whether, if untrue, those declarations were not *intentionally untrue*, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death. Contracts like that sued on are based for their validity upon the truthfulness of the declarations made by the applicant in the written application to the company. As the declarations are presumed to be true, the burden of proving them untrue is upon the defendant who controverts them. Whether the representations were material to the risk or not, is not open for inquiry in this case; for the defendant and plaintiff agreed, as it was competent for them to do, that if any of the declarations were in any respect untrue, the policy should be void.

Hence it is for the jury to determine from the evidence whether the defendant has shown any one of the declarations to have been untrue in any respect when made, and also whether the plaintiff has shown that at the date of the policy she was the lawful wife of the said O. F. Holabird.

The jury should pass upon this case with impartiality and free from all prejudice, for or against either of the parties to the suit. The rights of corporations and of natural persons are to be decided by the same rules of justice, and should be affected by no considerations except such as the law and evidence require when controversies arise between them for judicial investigation.

If the jury find for the plaintiff, they will assess her damages at \$10,000.00, deducting therefrom the amount of notes for premiums on the policy unpaid at the time of Mr. Holabird's death, together with any balance of the year's premium remaining unpaid, and will add interest on said sum at the rate of six per cent. per year from the time proof of death was submitted to the defendant to the present time.

If the jury find for the plaintiff, and are further satisfied from the evidence that the defendant has vexatiously refused to pay the loss in this case, they are at liberty, in their discretion, to add to the foregoing sum an amount not exceeding ten per centum of the amount of the loss. The law commits the question of vexatious refusal to the calm and deliberate consideration of the jury, to be determined in the light of all the facts and circumstances of the case.

## SUPREME COURT OF ARKANSAS,

DECEMBER TERM, 1872.

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*Appeal from Pulaski Circuit Court.*

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ARKANSAS MARINE, FIRE, ACCIDENT AND GENERAL  
INS. CO., *Appellant*,

vs.

BOSTICK AND RYAN, *Appellees*.\*

The appellant issued to the plaintiffs, residing at Fort Smith, on May 1st, 1868, an open policy for one year, which stipulated that the company thereby caused the plaintiffs to be insured, lost or not lost. About the 1st of April, 1869, the plaintiffs ordered a lot of tobacco from Louisville, which was shipped to them at Fort Smith by steamboat. They received the invoice on Sunday, April 11th, and early the next morning reported the shipment to the agent of the company at Fort Smith for the purpose of having the goods indorsed as insured, under the policy, from Memphis to Fort Smith. The agent indorsed the goods as so insured, charged the amount of the premiums to the plaintiffs according to custom, and forwarded the report of the same to the secretary of the company at Little Rock, by whom it was received April 14th. By the rules of the company persons holding open policies were required to report their goods immediately on receiving the invoices.

The boat, on the night of June 9th, while between Memphis and Little Rock, struck a snag, took fire and burned, and the goods were totally destroyed. The loss was known to the company when the agent's report was received, but was not known to the agent or to the plaintiffs at the time the insurance was applied for. The company afterward rejected the agent's report and cancelled the plaintiffs' policy.

The insurers can make themselves responsible for a loss which has already happened, even if that loss be total, so that the subject matter of the insurance is then non-existent, and this intention is expressly evidenced by the clause "lost or not lost," in the policy.

Even if it was the duty of the plaintiffs, under the policy, to report for insurance all goods shipped to them, their failure to do so would not work a forfeiture of the policy, unless such were the express terms of that instrument, and the act of the company's agent in insuring this shipment must be considered a waiver of any dereliction, so far as the insurance of these goods is concerned.

The policy provided that the agent should report applications to the home office "for entry on the office records and for protection purposes." The words

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\* Decision rendered December Term, 1872.

"protection purposes" cannot be construed to mean that the company might receive or refuse the application upon arrival.

The defendant is estopped by the act of its agent from any defense on the ground of deviation. The plaintiffs acted on the belief that the acts of the agent, who, knowing all the circumstances, indorsed the goods from Memphis instead of from Louisville, were the acts of the company, and they had a right to regard any objections on this ground as waived. Judgment affirmed.

BENNETT, J.

This was an action on what is called an open or running policy of insurance. Trial had—verdict and judgment in favor of Bostick and Ryan—motion for a new trial by defendants overruled and appeal granted. The facts in the case, as appears on, and admitted in the bill of exceptions, are as follows :

The plaintiffs below, Bostick & Ryan, were manufacturers of tobacco at Fort Smith, Arkansas, and in the Indian country west of Arkansas. On the 1st day of May, 1868, they took out and received from the defendants, the insurance company, an open policy, or what is sometimes called a running policy of insurance, which was to continue for one year from that date. About the 1st day of April, 1869, Bostick & Ryan ordered a shipment of tobacco from Leopold & Co., of Louisville, Kentucky, which was by Leopold & Co. shipped on board the steamboat "G. A. Thompson," which was a good and insurable boat, and was then bound for Fort Smith. The invoice of these goods was received by Bostick, one of the firm of Bostick & Ryan, the consignee, at Fort Smith, on Sunday, the 11th day of April, 1869, and on Monday, the 12th, immediately after breakfast hours, he, Bostick, reported the shipment to Janus H. Sparks, who was the acting and accredited agent of the company, at that place, for the purpose of being indorsed as insured under the policy. Sparks examined the invoice and asked Bostick whether he desired the goods to be insured from Louisville or only from Memphis, when Bostick said he was satisfied to have them take the risk from Memphis, or words to that effect, whereupon Sparks indorsed the goods as insured under the policy from Memphis to Fort Smith, and forwarded the application or report to William H. Fulton, the secretary of the company, at Little Rock, and which reached the secretary on the 14th of April. The "G. A. Thompson," with these goods on board, proceeded along her voyage, passed Memphis, entered the Arkansas River, and proceeded to a point about forty miles up the river, below Little Rock, where she struck a snag and sunk and was burned, and the goods were a total loss. The boat was lost during



the night of the 9th or early in the morning of the 10th of April, and it was proved that the loss occurred by the perils insured against. The loss was fully known to the company at Little Rock, when Bostick's report or application was received from the agent Sparks on the 14th of April, but was not known either to Sparks or Bostick, or to any of the plaintiffs at the time Bostick reported the goods to Sparks for insurance as aforesaid, on the 12th day of April.

When Fulton, the secretary, received the report from Sparks, it was regularly spread on the book of risks, but there was a protest against allowing the insurance or paying the claim, by members of the company, but it was agreed that it should be spread upon the books (which was the regular course according to rules and the course of business of the company for all stock reports of goods insured) until the plaintiffs should have notice in order that they might have a hearing on the question of rejecting the application and refusing the insurance. Afterward the report was rejected, the insurance set aside, and the plaintiff's policy was cancelled by the Board of Directors of the company, and plaintiff's claim for pay for the value of the goods was rejected and refused, and notice of this was served on the plaintiffs through the agent of the company, Sparks, at Fort Smith, on the 26th day of July, 1869. But previous to receiving this notice, plaintiffs had shipped other goods and reported them to Sparks in the same manner for insurance under the policy, and Sparks had received them, charging up the premiums, and forwarded them to the secretary, at Little Rock, and they were duly entered on the book of risks, but were afterward set aside, together with the setting aside of the risks on the last goods as aforesaid. At the time of reporting the goods to Sparks for insurance, no premiums were paid, but were charged up by Sparks to the plaintiff in a regular account book, which he kept for that purpose and that it was the regular custom of the company with those who held policies of this kind to charge up the premiums on the report of shipment of goods, and the account of premiums was collected quarterly.

It was further proved that the plaintiffs, after taking out this policy and before the shipment of the goods which were lost, made two or three other small shipments of goods which they did not report to the company, and the company did not receive premiums on them. They did this with a view of taking the risk of these small shipments themselves. It was further proved, that one shipment of goods made by them, after the issuing of the policy and before the shipment of

the last goods, was insured in another company, at Louisville, but that shipment was made by the order of the plaintiffs, sent by mail, and the insurance in the other company was effected by the consignors in Louisville, unbeknown to the plaintiffs, and the plaintiffs, on receiving the invoices, reported the goods as usual to the company through the agent, Sparks, and the premium was regularly charged and paid to defendants by plaintiff. Further, it was proved that the goods lost were worth the invoice price, to wit : \$1000.00. Further, it was proved that by the rules and regulations of the company, persons holding open policies of the company were required to report their goods immediately on receiving the invoices, but not at the time the shipment was made, except when the policy-holder was the consignor.

The bill of exceptions and motion for a new trial presents but three material points for adjudication.

*First.* It is contended that the company is not liable on its policy, because the goods were lost before the shipment of them was reported to Sparks, the agent, or the company's office at Little Rock, Ark.

An indorsement upon the policy requires a report of each shipment to be made to the office of the company at Little Rock, Arkansas, by mail or otherwise, the same day a shipment is made, or if on goods and merchandise to be received, the same day advice or the invoice of the shipment comes to hand, for entry on the office records and for protection purposes. In the body of the policy is found the following stipulation, "That the Arkansas Fire, Marine, Life, Accident, and General Insurance Company, do by these presents cause Bostick & Ryan to be insured, *lost or not lost*," &c.

In the determination of our first proposition it will be necessary to fully understand the meaning and import of the clause, "*lost or not lost*." Policies are frequently effected, not only on ships and goods in home ports, but on those, also, which are in foreign ports, or actually at sea on their way either to this or other countries, and with regard to which it is, of course, uncertain whether they may not actually have been lost before the policy was effected. These words have been inserted in almost all marine insurance. Arnould, in his work on Insurance, Vol. I, p. 26, says: This clause, however, though omitted, does not appear to be strictly necessary, as there can be no reason why a previous loss of the subject insured should prejudice an insurance subsequently effected, if both the insured and the underwriter were equally ignorant of the loss at the time." The opinion of the author is sustained by Marshall in his work on Insur-

ance, p. 338—340. 1 Phill. Ins. 72., 438. 3 Kent (6th Ed.) 258 Note C.

It was decided by Lord Denman, in the case of *Mead vs. Davidson*, 3 Ad. and Ell., p. 303, that a policy containing the clause was good when the subject of insurance was accepted for insurance and the premiums paid before loss, although the policy was not executed until *after* a loss had happened, to the knowledge both of the assured and the underwriter.

Phillips, in his work on Insurance, Vol. 1, p. 925, says: "The risk may be assumed by the underwriters for an anterior period, and cover losses prior to the date of the policy; provided there is no concealment or misrepresentation by either party. For this purpose the clause "lost or not lost," is introduced. But this clause is not necessary; it is sufficient if it appear by the description of the risk and the subject of the contract, that the policy is intended to cover previous losses."

It is then evident that the insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, even if that loss be total, so that the subject matter of the insurance is then non-existent; and this intention is expressly evidenced by the clause "lost or not lost," in the policy.

The material question, then, presented under this proposition, is whether or not the company were under a contract within any of the terms and conditions of the policy, to insure the goods at the time the loss occurred. This contract of insurance arises out of an open or running policy, which, from the very nature of such policies, enables merchants etc. to insure goods shipped at a distant port, when it is impossible for them to be advised of the particular boat, or all the circumstances attending the shipment at first. The contract, however, does not become complete until a declaration of his desire to insure is made by the assured. Until this is done, the contract is inchoate and incomplete, and if not made at all, the risk is regarded as not having commenced.

Was such a declaration made by the plaintiff in the case before us? We think there can be no dispute as to that fact. It is shown by the testimony that the invoice of the goods were received on Sunday, April 11th, 1869, by Bostick, one of the firm of Bostick & Ryan, and on Monday, the 12th, immediately after breakfast hour, he (Bostick) reported the shipment to James H. Sparks, who was the acting and accredited agent of the company, and such invoice was re-

ceived by him at that time, and the amount of premium charged to Bostick & Ryan, as was the usual custom at Fort Smith. Applying the principles of law regulating policies of this kind, and the requisite act necessary to be done by the assured and the company, we are confident the company are liable under their policy, whether the goods were "lost or not lost" at the time the insurance was effected, unless the policy had been rendered null and void by previous act of the parties.

The principles of law and rules of construction governing policies of this description appear to be well settled, as may be seen by reference to the authorities collected in the text-writers, and the following leading cases: *The City of Davenport vs. Peoria Marine and Fire Ins. Co.*, 17 Iowa, 276; *Kelly vs. Commonwealth Ins. Co.*, 10 Bos., (N. Y.), 82; *Paddock vs. Franklin Ins. Co.*, 11 Pick., 227; *Orient Mutual Ins. Co. vs. Wright*, 23 How., (U. S.), 401; *Mark vs. Aetna Ins. Co.*, 29 Ind., 390; *E. Carver Company vs. Manufacturers Ins. Co.*, 6 Gray, 215.

The second point raised by the pleading and facts is, was the policy rendered nugatory by the previous act of the plaintiff in not insuring *all* goods consigned or received by them under the policy?

It is conceded that plaintiffs did make several shipments of goods which they did not report to the company, and upon which they did not receive premiums. And it was further proven that the plaintiff did insure one shipment of goods in another company, but such insurance was effected by the consigner of the goods, and not by the procurement of the plaintiff.

Conceding, for the purpose of argument, that under the application for insurance and the policy it was understood that the plaintiffs were to insure all the goods consigned to or shipped by them in this company, a failure on the part of the plaintiffs to do so would not work a forfeiture of the policy, unless such were the express terms of that instrument. Such a provision would doubtless be a condition precedent, the performance of which, by the plaintiff, would be indispensable to his right of recovery, unless it had been dispensed with or waived by the defendants. *Inman vs. Western Fire Ins. Co.*, 12 Wend., 460.

It is only where a duty is created by the law that renders a contract void by non-performance of some requirement, and not when the duty is created by implication by the contract. *Harmony vs. Brogham*, 2 Kem., 99.

Under the policy of insurance the duty of the plaintiffs may have

been to report for insurance all goods shipped to them; but this duty was created by the contract, which does not fix a penalty for the failure to do so, and the law of insurance will not arbitrarily say it *ipso facto* works a forfeiture. Even if this was the general principle in the case before us, the facts would justify us in saying the company have waived all right to this defense.

Bostick reported the shipment to James H. Sparks, an accredited and acting agent of the company, at the place where he resided, for the purpose of having the shipment indorsed as insured under this policy. Sparks, the agent, indorsed them as insured. From that moment the company were liable for any loss that might have or had occurred. The agent reported the application to the home office, at Little Rock, as he was required to do by the indorsement of the policy, "for entry on the office records and for protection purposes."

The words "protection purposes," to be found in the indorsement, cannot be construed to mean that the company might receive or refuse the application upon arrival. It was not the intention or understanding between the parties at the time of taking out the policy, or when the insurance was effected. Sparks was acting as agent of the company at Fort Smith, with general powers. The validity of his acts to third persons did not depend upon the approval of the company, nor can they secretly reserve the right of approval or disapproval at a future period. The company have not the power to say, by their agent, to a person desiring insurance, "your shipment is insured," and leave him under that impression until after a loss has happened, and then say to him that their election has not been made. Honesty and fair dealing forbid it.

If there had been any previous dereliction on the part of the plaintiff in reporting shipments or payment of premiums previous to this transaction, the act of the company's agent in insuring this one must be considered as a waiver of them, so far as the insurance of these goods is concerned.

As to whether the plaintiffs are not liable to pay premiums on all goods shipped by them during the life of this open policy, we are not called upon to decide; but that non-payment of them works a forfeiture of the policy on this shipment, we deny. There is not even a provision in the policy or application to this effect, and the law will not certainly annex one for the parties.

The third point for adjudication is, whether the goods were insured under the policy as they were shipped from Louisville, Kentucky,

and reported and indorsed for insurance from Memphis, a way port. The evidence shows that the goods were reported to the agent, Sparks, as shipped from Louisville, and the agent entered them, by agreement between him and Bostick, as insured from Memphis.

The insurance from Memphis was the proposition of Sparks, the agent, and whatever may have been the requirements in this respect, in the policy, we are clearly of the opinion that the defendants are estopped in the present case from any supposed deviation as a ground of defense, by the act of their agent. By his act, the plaintiffs had a right to regard any objections on this ground as waived, where there was no concealment on their part as to where the goods were shipped from. Certainly it cannot be allowed as a defense to this action without operating as in the nature of a fraud on the plaintiffs, who have acted on the belief that the acts of the agent were the acts of the company, and who, knowing all the circumstances, indorsed the goods from Memphis instead of from Louisville.

Having fully considered all the propositions as raised in the trial of the case, and finding no error, the judgment is, in all things, affirmed.

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UNITED STATES CIRCUIT COURT,

DISTRICT OF INDIANA.

MAY TERM, 1873.

JOSEPH R. PAYSON, ASSIGNEE OF THE REPUBLIC INS. CO.,  
OF CHICAGO, ILL., *Plaintiff*,

vs.

WARREN H. WITHERS, *Defendant*.\*

The defendant, a citizen and resident of Indiana, subscribed to ten shares of the stock of the insurance company, a corporation organized in Illinois, for which a certificate was issued to him. By the terms of the charter and the conditions of the subscription, twenty per cent. was to be paid in cash and eighty per cent. was to be paid in case losses rendered its payment necessary. By its losses at the great fire in Chicago the company became insolvent, and a decree of bank-

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\* Decision rendered May Term, 1873. From Chicago Legal News.

ruptcy was rendered against it, the court making an assessment of sixty dollars on each share of the stock.

The defense that the party was ignorant of the condition of the company, and that he relied upon the representations of the company's agents, and upon their statement that no more than twenty per cent. would ever be assessed against him, cannot avail against the terms of the charter agreed to in writing.

The subscription to the stock was made in Indiana with the agent of the company. The statute of that State required that agents of insurance companies from other States should, before entering upon their duties in that State, deposit in the county clerk's office a copy of their commission or appointment from the company, together with certain other papers, and declared that no such company should enforce any contract made by their agents until there had been a compliance with the law. The fifth section declared what acts should constitute a person an agent of such a company, and the sixth provided that the fifth should not apply to persons acting as agents for foreign corporations for a specific or temporary purpose, and for a purpose not within the ordinary business of such corporations.

*Held*, that the ordinary business done by the company in question was an insurance business, and that the act does not refer to the obtaining of subscriptions to its stock.

The original charter of the company provided that the capital stock of the company should be \$1,000,000, which might be increased not to exceed \$5,000,000, at the discretion of the stockholders. After the defendant's subscription to the stock, an amendment to the charter was passed by the Legislature which provided that the board of directors should have power to increase the capital stock from time to time, in their discretion.

*Held*, that this amendment of the charter of the company was not such a change as would authorize a subscriber to say that his contract to pay the remainder of his subscription was at an end.

The original charter also declared, that a certain notice should be given to each stockholder of the election of directors, and that the election should be by ballot, by a majority of the stock, allowing one vote for each share. The amendment provided that the stockholders residing in any town or city might, at any annual meeting, elect such number of the directors as they might be entitled to by the by-laws of the corporation.

*Held*, that this was not such a change in the charter as would authorize a subscriber to the stock to declare his agreement of subscription at an end, and release him from his obligation.

The board of directors, before the defendant subscribed to his stock, passed a resolution to increase the capital stock of the company to \$5,000,000, to which increase the stockholders never consented. The stock issued to defendant was in excess of the \$1,000,000 authorized by the original charter, and he had no knowledge of the manner in which the stock had been increased. After the amendment of the charter the directors affirmed their previous action increasing the capital stock, and the defendant did not repudiate his membership as a stockholder, but retained his certificate of stock, took part in the election of directors, and received dividends.

*Held*, that the change in the capital stock, before the amendment of the charter, was not of such a character as to authorize the defendant to declare his obligations to pay for his stock at an end, and that, however, that might be, the act of the directors and of the defendant after the amendment estops him from setting up the change as a defense.—Judgment for the plaintiff.

BAKER, HORD & HENDRICKS, AND CHAS. E. MARSH, *for Plaintiff.*

MORRIS & WETHERS, McDONALD & BUTLER, HARRISON & HINES, AND  
W. H. CALKINS, *for Defendant.*

DRUMMOND, J.

This is an action brought by Joseph R. Payson, the assignee of the Republic Insurance Company, of Chicago, Illinois, against Warren H. Withers. The cause of action, as set forth in the complaint, is that on the 30th of July, 1868, the defendant became owner of ten shares of capital stock of the insurance company, and that the stock was issued and taken by the defendant upon the condition that twenty per cent. was to be paid in cash, and eighty per cent. was to be paid in case losses rendered its payment necessary; that these were the terms of the charter, and the conditions upon which the defendant became the subscriber to ten shares of the stock; and a certificate of stock for these shares was accordingly issued to him. The complaint proceeds to state that by the losses which occurred in the fire on the 9th of October, 1871, at Chicago, the company became insolvent; that a petition in bankruptcy was filed against the company in the District Court of the United States for the Northern District of Illinois, and a decree of bankruptcy was rendered against it in that court; and that court had made an assessment of sixty dollars on each share of the stock, and required the assignee to collect the same. This is substantially the cause of action set forth in the complaint.

There is a general denial by the defendant, which puts the material allegations of the complaint in issue; and there are various special defenses set up in the answer, the effect of which is the matter for consideration. The first special defense is, in substance, that the subscription of stock was made by the defendant in Fort Wayne, in this State; that the company was domiciled and established in Illinois, and was, in fact, a corporation created by the laws of Illinois; that the agents of the company came to the defendant and made certain representations as to its condition and the terms upon which the stock was to be subscribed, alleging that no more than twenty dollars per share would be assessed against him or ever called for. The defendant asserts that he was ignorant of the actual condition of the company, and of the circumstances connected with its organization and progress so far, and that he, relying upon the statements of agents, authorized his name to be entered as a subscriber upon the books of the company, and upon that condition.

Now, as to this defense, it will be observed that it does not meet the material allegations of the complaint, or answer them. It may



be all true ; still, the agreement set forth in the complaint would create an absolute liability on the part of the defendant, as by the terms of the charter the stock was to be taken in the manner stated, paid for as set forth, and he agreed to these terms in writing.

This defense clearly, therefore, does not go far enough. The result would be, even giving it all the effect that could be claimed for it, to change, by loose declarations made by the parties at the time; a written agreement, which of course cannot be done according to well-settled principles of law.

Another special defense is that the subscription to the stock was made by the defendant in Indiana ; that the agent of the company, who was then engaged in the general business of procuring subscriptions to the stock of the company in this State, did not comply with laws of the State of Indiana prior to the commencement of its business, and, therefore, that the subscription was not operative as against the defendant. This is a special defense set up under the act of June 17th, 1852, of this State, respecting foreign corporations and their agents ; and the first section of that act declares as to corporations not incorporated or organized in this State, that the agents, before entering upon the duties of their agency in this State, shall deposit in the clerk's office of the county where they propose doing business, a power of attorney, commission, appointment, or other authority, under or by virtue of which they act as agents. The second section declares what the agents of the corporation shall do, viz., file with the clerk of the Circuit Court before commencing the duties of their agency, the authority of the board of directors authorizing citizens of this State to maintain actions in the State in relation to any contracts, and authorizing service of process. The third section declares that the service of process on agents shall be sufficient. And the fourth section, that foreign corporations shall not enforce any contracts made by their agents before a compliance shall have been made with the provisions of sections one and two of the act. The fifth section declares that any person who shall directly or indirectly receive or transmit money or other valuable things to or for the use of such corporation, or who shall in any manner make or cause to be made any contract, or transact any business for or on account of any such foreign corporation, shall be deemed an agent of said corporation, and be subject to the provisions of this act relating to the agents of foreign corporations. These are the provisions of the law contained in the first, second, third, fourth and fifth sections. The sixth section, however, provides that the fifth section shall not apply to persons act-

ing as agents for foreign corporations for a special or temporary purpose, and for a purpose not within the ordinary business of such corporations.

Now it is a question which lies at the threshold of the examination of this part of the case, whether the act which was done by the agent of this corporation and the agreement which was entered into by the defendant with that agent, was such an act or agreement as was contemplated by this law, and which it intended to render inoperative unless the agent had complied with its conditions. I am clearly of opinion that it was not. Conceding that a State would have the power to prevent any of its citizens from subscribing within its own limits to the stock of a corporation of another State, it would require a clear and explicit declaration that such a subscription should be null and void except upon compliance with certain terms. This act relates to the usual business done by a corporation and by its agents, and does not refer to obtaining subscription to its stock. The ordinary business, for instance, done by the corporation in question here, was an insurance business. The obtaining of subscriptions was an act preliminary to the commencement of its business. When the subscriptions were obtained, and the corporation was set in motion and was made to perform its functions, then the ordinary business referred to by this act began—the issuing of policies of insurance and performing the general and other business connected with such corporations.

I do not think that it is a fair or reasonable construction of the language of this law that it intended to prohibit such a contract as this. It does not appear, in point of fact, by this special defense which I am now considering, that the corporation was doing any of this ordinary business. The language, I think, therefore, of this sixth section, intended to exclude any such agreement as was made by the defendant in this case when it declared that it was not to apply to persons acting as agents for a special and temporary purpose, or for purposes not within the ordinary business of such corporation.

Another special defense set up is that the company, without the knowledge or consent of the defendant, on the 25th of March, 1869, obtained from the legislature of Illinois an amendment to its charter, by which the directors had the right to increase the capital stock of the company to five millions of dollars, and thereby the original charter was so changed as to release him from his liability to pay for his stock. It is necessary, in order to determine the validity of this defense, to look into the charter and the amendment to see whether it is justly subject to the objection that is made by the defendant. The

act incorporating the Republic Insurance Company was passed by the legislature of Illinois on the 15th of February, 1865. The first section of the act created certain persons and their successors and assigns a body corporate by the name of the Republic Insurance Company, of Chicago. The second section was as follows: "The capital stock of said corporation shall be one million of dollars, and may be increased to not exceeding five millions of dollars, at the discretion of the stockholders, and shall be divided into shares of one hundred dollars each, which shall be considered personal property, and be assignable and transferable only upon the books of the company under such regulations as the directors shall establish." The third section provides that when one hundred thousand dollars were subscribed and certain conditions were complied with—that they had organized by choosing three or more directors, and those directors had chosen a president, secretary and treasurer, and filed a certificate in the office of the clerk of the city of Chicago—then the company was to be deemed fully organized. The fourth section authorized the corporation to make and put in execution by-laws and regulations. There are some other sections of the usual character in the charters of corporations of this kind, to which it is not necessary to refer. The eighth section declared that the stock and affairs of said corporation should be managed by three or more directors. Now this is, as far as it concerns any question involved in this special defense, all of the charter that need be referred to.

The amendment which is objected to and referred to in this special defense, was passed by the legislature of Illinois on the 25th of March, 1869, the first section of which authorized the company to purchase and hold such real estate as might be convenient for the transaction of its business, and also to purchase any estate that it might be necessary to purchase which was given to secure any loan or debt. The second section of the amendment was as follows: "The board of directors shall have power to increase the capital stock of said company from time to time, in their discretion." It will be recollected that the language of the second section of the original act was, that it might be increased to not exceeding five millions of dollars, at the discretion of the stockholders. This authorized it to be increased at the discretion of the board of directors. The amendment says nothing about the extent of the increase. The third section declared that the stockholders resident in any town or city within the United States might, at any annual meeting of such stockholders, to be held in such town or city, elect such number of

members for a board of directors as such stockholders might be entitled to by the by-laws of the corporation. The fourth section authorized the board of directors to make by-laws. The original act was, that the corporation might have power to make and put in execution by-laws—probably no essential difference between the original act and the amendment in this particular. The amendment contains two other sections that have no bearing upon the question before the court.

Now so far as there are any changes made by the amendment of such a character as to affect the contract which the defendant had made in 1868 with the corporation, there are only two particulars to which it is necessary to refer. As I have said, by the original charter the capital of the company was to be increased to five millions of dollars at the discretion of the stockholders. By the amendment, the board of directors had the right to increase it. The original charter declared that certain notice should be given of the election of directors to each stockholder by public advertisement or personal notice, and that it should be by ballot by a majority of the stock, allowing one vote for every share, either by person or by proxy; and the amendment declared that certain persons, under the circumstances referred to in it, should meet and elect directors—as many as the by-laws would authorize. These seem to me to be the only substantial particulars under which it can be claimed that the amendment constituted such a change in the relation between the corporation and stockholders as to authorize any stockholder to claim that the contract which he had made to subscribe to the stock was vitiated; and the question is whether these changes give any countenance to that position? I think they do not.

How the discretion of the stockholders to increase the stock should be made manifest, the original charter does not state. It declared that the stock and affairs of the corporation were to be managed by the directors, and there is great force, I think, in the argument, that inasmuch as the directors were the persons through whom the stockholders acted, that discretion might be manifested through the authorized action of the directors. But however this may be, I do not think that the change of such vague and indefinite phraseology as this, as to the manner in which the capital of a corporation is to be increased, would give the right to a subscriber to the stock to declare that the contract which he had made for his subscription, and by which he paid a certain portion and agreed to pay the remainder when the necessity for its payment appeared, was at an end. It

seems to me that is was one of the implied conditions upon which he entered into his agreement—that the power of the legislature might be exercised to vary in that way the manner in which the capital stock should be increased. It may be conceded that there are limitations to the power of the legislature in such a case as this ; that the legislature may go so far in changing, altering, or revolutionizing the whole scope and spirit of the original charter by amendments, as to authorize a stockholder to say that he has not entered into that contract—that his obligations have ceased by wrongful acts of the legislature ; but while that is true, it is also true that, to a certain extent, the terms of a grant are subject to the control of the legislature, and every stockholder takes his shares subject to that control, and subject also to the control of those who manage its affairs, namely, the board of directors. And, therefore, when the legislature has acted in such a manner as this, and has merely declared that instead of the stock being increased by the corporation at the discretion of the stockholders, that it shall be increased by the resolution or act of the board of directors, it is not such a change, in my opinion, as would authorize a subscriber to say that his contract is at an end.

Then as to the election of directors. It is true that there is, to some extent, a change made in the mode of electing directors ; but it is to be observed that the original charter does not declare how many directors there shall be. It is three or more—no limit to the number of directors ; and the amendment simply declares that the stockholders, within certain territorial limits, may have the power to elect such number of directors as the by-laws may authorize. Now, certainly there is nothing in the original charter to prevent these by-laws from declaring what number of directors there shall be, and what their qualifications, other than they must be stockholders as the original charter requires. There was, therefore, no such change by this amendment, in the original terms of the law, as to authorize a subscriber to the stock to declare his agreement of subscription at an end and his release from its obligation.

The other special defense, and I think the most important one presented in this case, is that which declares that this was a company incorporated by the legislature of Illinois with a capital stock of one million of dollars, and power to the stockholders at discretion to increase it to five millions of dollars, and that the stockholders never increased the stock, but that the board of directors in January, 1868, by resolution pretended to do so to the extent of five millions of dollars ; that the stockholders never consented to this increase ; that the

defendant subscribed for his stock in July, 1868, at Fort Wayne ; that this stock was in excess of the one million of dollars of stock which was authorized by the original charter ; and that he had no knowledge of the manner in which the capital stock had been increased. It will be seen, however, from what has already been said, that it can hardly be claimed, on the part of the defendant, that this change was of such a character, taking this special defense in its largest extent, as to authorize him to declare his obligation at an end. As I have said, it may well be claimed it was a power, incident to the grant, for the legislature to authorize an increase of the capital stock by the directors, even if, under the terms of the original charter, the stockholders could not exercise that discretion through the directors.

It will not do, when a citizen of a State subscribes to the capital stock of a foreign corporation, to say that he was ignorant of the terms of the act which created that corporation. He is presumed to know what those terms are. They are created by the law of another State, and he, for the purpose of assuming his obligation, in a certain sense, goes into another State and casts off for the time the vesture which his own State throws around him, and puts on that of the other State, and is bound by the obligations which the legislature of that State has imposed upon the corporation, and the privileges which it has granted, and the condition and terms of the grant. All these he is presumed to know, just as much as when he makes any contract to be executed by him in another State. When he makes a contract in Indiana which is to be executed in another State, every citizen of Indiana is bound by the laws of the State where the contract is by him to be performed. The laws of Indiana have all ceased to operate upon that contract when he enters into it upon the condition and understanding that its terms and obligations are to be controlled by the laws of another State. So here this defendant, when he entered into this agreement, did it with reference to the laws of the State of Illinois—the special act of incorporation which was passed in February, 1865. The well-known maxim, of course, applies to him in this case, just as it does in relation to any law of Indiana—that ignorance of it does not excuse him.

But, however this may be in relation to this special defense, the replication made to it, I think, removes every difficulty there may be in the way, which alleges that after the passage and taking effect of the amendatory act, the directors affirmed their previous action increasing the stock of the company to five millions of dollars, and that the defendant did no act in repudiation or denial of his membership in

the insurance company as stockholder ; but, on the contrary, until after the happening of the losses, the defendant continued to hold and retain his certificate of stock which had been issued to him by the company, and to participate in its affairs and profits, by aiding in the election of directors, and by receiving dividends declared on his stock. Now, this, I think, is a good reply to anything contained in this special defense.

It may be said in conclusion, that the defense is not of a character to commend itself very strongly to the consideration of a court of justice. The company was unfortunate. Everything went on, as far as we can know—and we have the right to suppose so from the allegations contained in these pleadings—satisfactorily to the defendant until this misfortune happened. He made no complaint. He participated in all the advantages of the company, received dividends, and elected directors, but when the storm came—when this terrible fire swept away so many millions of property—and rendered this company bankrupt, and made it indispensable for those who had claims upon it to call upon the subscribers to the stock to meet their obligations, in order to fulfill contracts of the company, then he complains—then he wakes up to all the various objections which are set forth in this answer.

Now under such circumstances, when this is the only fund that the policy-holders have to meet the losses which they have incurred, and the only way in which the bankrupt company itself can respond to their demands, it would seem as though there ought to be an insuperable bar created by the law, impossible to get over in order to prevent equity from being done in such a case. I see no insurmountable obstacle in the way here to prevent the course of equity.

## COURT OF APPEALS OF MARYLAND,

APRIL TERM, 1872.

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*Appeal from the Superior Court of Baltimore City.*  
—

THE FRANKLIN FIRE INS. CO., OF BALTIMORE, *Appellant*,

vs.

THE CHICAGO ICE COMPANY, *Appellee*.\*

The appellant issued a policy upon an ice-house belonging to the appellee. The policy provided that persons sustaining loss or damage should forthwith give notice thereof, and should also furnish proofs of loss, including a certificate from a magistrate or notary public. The policy also provided that nothing but a distinct specific agreement, clearly expressed, and indorsed on the policy, should operate as a waiver of any condition or restriction therein.

The appellee, after the loss, delivered proofs of loss to the agent of the appellant, but failed to deliver a certificate from a magistrate or notary public. No objection was made by the company to the absence of the certificate, and the president of the company afterwards refused to pay the loss, on other grounds than the defects in the proofs of loss or the absence of the certificate.

*Held*, that apart from the provision in the policy in regard to waiver, the appellant was precluded from objecting to the sufficiency of the proofs of loss, and that the provision refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and that it has no reference to those stipulations which are to be performed after the loss has occurred, such as giving notice and furnishing proofs of loss.

On the back of the policy was the following printed memorandum: "Builders' Risk.—The working of carpenters, roofers, tin-smiths, gas-fitters, plumbers or other mechanics in building, altering or repairing the premises named in the policy, will vitiate the same unless permission for such work is indorsed in writing hereon." The president testified that he always kept a crew of men, and a carpenter or two, about the building the year round, and was constantly making repairs and keeping the building in thorough condition.

*Held*, that the memorandum did not refer to the casual patching up of the building, such as was spoken of by the witness, but to such hazardous use of the building as is generally denominated "Builder's Risk," which arises from placing it under the control of workmen for rebuilding, alteration or repairs.

The liability of the building to injury by the use for which it was intended, and the necessity for the prosecution of business that the breakages and damages should be repaired as they occurred, will be presumed to have been in the con

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\* Decision rendered May 22nd, 1872.



temptation of the company at the time the contract was made, and to have been permitted by the written terms of the policy insuring the premises as an ice-house.

The proposition that the assured was obliged to continue the same insurance on the property as existed at the time of the application, was erroneous. There was no such warranty in the policy.

The proof was, that appellee was in possession of the property, claiming and occupying it as its owner.

*Held*, that in the absence of proof of an outstanding title in others or any incumbrance upon the property, the *prima facie* presumption of a seizin in fee growing out of the occupation by the appellee as owner of the property, was sufficient to show an insurable interest therein. Judgment affirmed.

This was an action of *covenant* on a policy of insurance issued by the appellant to the appellee, insuring against loss or damage by fire to the amount of twenty-five hundred dollars, from the 10th of November, 1868, to the 10th of November 1869, "their one story frame ice-house, situate detached on the line of the Chicago and Northwestern Railroad, at Crystal Lake, McHenry County, Illinois." The fire occurred early on the morning of the 11th of August, 1869, and on the same day Mr. Blake, the secretary of the appellee, gave notice of the loss to Messrs. Campbell, Whitman & Wallace, the agents in Chicago of the appellant who took the insurance, and on the same day they sent the notice of the loss to the appellant. The proofs of the loss were then made out by the secretary, Mr. Blake, who was inexperienced in such matters, and was not aware of the necessity to have a certificate of the nearest magistrate or notary public, as required by the following condition of the policy :

X. "Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just ; showing also whether any, and what insurance has been made on the same property ; giving a copy of the written portion of the policy of each company ; what was the whole cash value of the subject insured and their interest therein ; in what general manner the building containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated. They shall also produce a certificate under the hand and seal of a magistrate, notary public or commissioner of deeds most contiguous to the place of the fire, and not

concerned in the loss as creditor or otherwise, not related to the insured, stating that he has examined the circumstances attending the fire, loss or damage alleged, and that he is acquainted with the character and circumstances of the assured, and that he verily believes that he, she, or they have by misfortune and without fraud or evil practice, sustained loss and damage on the subject insured to the amount which such magistrate, notary public or commissioner of deeds may certify." \* \* \* \* \*

When Campbell, Whitman & Wallace, on the 11th of August, 1869, sent the notice of loss, they received in reply from the president of the appellant, a letter dated the 17th of the same month, by which they were notified that the matter had been referred to Barnum & Wells as the adjusters of the appellant. Barnum & Wells declined to act, but with the approval of the appellant employed R. H. Lawrence as adjuster in their stead. Blake, the secretary of the appellee, made up the proofs of loss and left them with Campbell, Whitman & Wallace ten days or two weeks after the fire. No objection was made to the want of a certificate. Campbell, Whitman & Wallace, after retaining the proofs for several days, returned them to Blake with directions to hand them to Mr. Lawrence, the adjuster. Blake delivered the proofs to Lawrence, receiving a promise to let him know if they were correct, after he had examined them. The proofs were sent by Lawrence to the appellant and they were received about the last of September, 1869. No notice was ever given to the appellee of any objections to the proofs furnished on the ground of the absence of the certificate, and no objection was made even in general terms to the proofs until the letter of the president of the appellant to the appellee's attorney under date of the 28th of December, 1869. In the month of December Mr. Smith, the president of the appellee, went to Baltimore and there had an interview with the president of the appellant, and demanded payment, which was refused, not on the ground of the insufficiency of the proofs, but because, as the appellant claimed, it was not on the risk. Mr. White, the president of the appellant, gave a different statement of the interview, but fixed the date of the meeting as early in December. Mr. Smith having been unable to obtain the amount which he claimed under the policy, applied to counsel, whereupon the following correspondence occurred between them and the president of the appellant :

*Baltimore, Dec. 17th, 1869.*

DEAR SIR :—We hold for collection the claim of the Chicago Ice

Company under your policy, No. 2396, for \$2,500.00. We understand you have received proof of loss. If the same is insufficient or defective in any particular we will gladly correct it upon notice.

We trust we can arrange this matter with you without suit.

Truly yours,

MARSHALL & FISHER.

MR. WHITE, *Prest. Franklin Fire Insurance Co.*

*Baltimore, Dec. 18th, 1869.*

MESSRS. MARSHALL & FISHER,

*Gentlemen:*—Your note is at hand and duly considered. I have written to Chicago for a full report in regard to the loss of Chicago Ice Co., and expect to receive it in a few days, when I will call upon you.

Very truly yours,

L. S. WHITE, *Prest.*

*Baltimore, Dec. 28th, 1869.*

MESSRS. MARSHALL & FISHER,

*Gentlemen:*—The papers sent us as "Proofs" in regard to loss of Chicago Ice Co., are not complete nor satisfactory. You will therefore please have the same properly prepared and placed in our hands, so that we can give the same proper examination and consideration.

Very truly yours,

L. S. WHITE, *Prest.*

*Baltimore, 29th, Dec., 1869.*

L. S. WHITE, Esq., *Prest. Franklin Fire Ins. Co.,*

*Dear Sir:*—Yours of 28th inst. is received. In your former letter of the 18th inst. you informed us that you had written to Chicago for a full report in regard to the loss, and expected to receive it in a few days, when you would call upon us. It seems that at the date of your first letter you made no objection to the proof of loss, nor are we aware in what respect you now object to it.

If you will indicate the particulars in which you consider the proof of loss defective, we will take measures to have all such defects cured as far as we may deem it material to do so.

We desire also to know, to save all unnecessary trouble, whether your company will pay upon being furnished with such preliminary proof as your policy requires.

Very respectfully, your obedient servants,

MARSHALL & FISHER.

*Baltimore, January 3rd, 1870.*

MESSES. MARSHALL & FISHER, *Baltimore,*

*Gentlemen:* As president of the Franklin Fire Ins. Co., I must insist that the Chicago Ice Co. shall furnish proper legal preliminary proofs of loss before they claim payment of this company, and I do not intend in any wise to waive the production of such preliminary proofs as required by our policy. What preliminary proofs are necessary and *material* you must determine from the policy, and as lawyers you can do that better than myself.

Very truly yours,

L. S. WHITE, *Pres't.*

The following memorandum was printed on the back of the policy of insurance :

**Builder's Risk.**—The working of carpenters, roofers, tin-smiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy, will vitiate the same, unless permission for such work be indorsed in writing hereon.

**Exception.**—The plaintiff offered three prayers, the second and third of which the court refused ; the first, as follows, it granted :

1st. That if the jury shall find from the evidence that the plaintiff furnished to the agent of the defendant, in Chicago, the preliminary proofs of loss offered in evidence, and that said proofs were forwarded by said agent to the defendant, and received by the defendant on the 25th of September, 1869, and that the defendant retained said proofs of loss, and made to the plaintiff or its agents no objection thereto, nor any objection to the absence of a certificate as required by the 10th condition of the policy, up to the time when Mr. White, president of the defendant, had the conversation with the witness Smith, testified to by said Smith, in the month of December, 1869, should the jury find such conversation ; and if they further find that in said conversation the said president of the defendant refused to pay the loss under said policy upon grounds other than the defects of said proofs of loss, or the absence of said certificate, or both, and that at the time of so refusing to pay, the said president of the defendant made to said Smith no objection to said proofs of loss, or to the absence of said certificate, then the defendant cannot now object to the sufficiency of said proofs, nor the absence of said certificate, notwithstanding the jury may find that the witness White wrote the letters of December 28th,

1869, and January 3rd, 1870, under the circumstances offered in evidence.

The defendant offered the following prayers :

1st. That if the jury believe the statement of the witness, James P. Smith, Jr., the president and superintendent of the plaintiff, in his deposition contained, that he kept a crew of workmen and a carpenter or two about the building in controversy the year round, and was constantly making repairs and keeping the building in thorough condition, the policy was vitiated by reason of the facts so stated, under the memorandum printed on the back of said policy and headed "Builder's Risk," and the verdict must be for the defendant.

2nd. That the preliminary proof offered in evidence by the plaintiff as having been furnished to the defendant prior to the institution of this action is not legally sufficient to entitle the plaintiff to recover, and it being admitted that the president of defendant, acting for it, addressed to the attorneys of the plaintiff, and sent to them on or about the third of January, 1870, the letter of that date which is in evidence, the verdict of the jury must be for the defendant.

3rd. That the plaintiff was bound to disclose and make known to the defendant, before or at the time of the delivery of the policy in suit, every fact material to the risk ; and if the jury shall find that the plaintiff failed or omitted so to disclose and to make known to the defendant any fact whatever material to the risk, the jury must find for the defendant—even although the jury should further find that Campbell, Whitman & Wallace, of Chicago, were at that time agents of the defendant to receive and forward applications for insurance, and that they were referred by the plaintiff to L. N. Moore & Co., of Chicago, and took the form of the policy or application from one of the forms of said L. N. Moore & Co., without any representation on the part of the plaintiff as stated by the witness Wallace. This prayer was refused as offered, but granted with the following modification :

But in considering the proposition put to them in this prayer, the jury are to take into consideration that the defendant, in making insurance upon an ice-house like that mentioned in the evidence, and devoted to the uses therein mentioned, is presumed to know and to have contemplated all the casualties and incidents to which the subject might be properly liable as such ice-house devoted to such uses.

4th. That Campbell, Whitman & Wallace, of Chicago, were capable of acting in law and fact as the agents of the plaintiff in obtaining insurance from the defendant, notwithstanding they were at the

same time agents of the defendant to procure business for it. And if the jury shall find that the plaintiff did so make the said firm its agents in this case, the plaintiff is as much bound by their acts done in the cause of such agency as if they had not been defendant's agents at the same time.

5th. That the defendant is not bound by any acts of parties in Chicago purporting to be its agents, except to the extent to which the jury shall find that they were authorized by the defendant to act for it prior to the acts done, or at the time thereof, and not subsequently thereto, [*unless they shall find that after the said acts, and with full knowledge thereof, the defendant ratified and confirmed them.*] And the jury, in determining upon the existence and extent of any such agency, must be governed by their own conclusions from the evidence, and not by the declarations or pretensions of parties claiming to be agents of the defendant, and to act in its name, although the testimony of such parties as witnesses may be regarded for that purpose along with its other evidence in the case. (Refused as offered, but granted with this modification :) Unless they shall find that after the said acts, and with full knowledge thereof, the defendant ratified and confirmed them.

6th. That if during the period embraced in the policy the premises in question were so occupied or used as to increase the risk, or if the risk during the said period was increased by any means whatever within the control of the assured, the policy is void, and the plaintiff is not entitled to recover.

7th. That if the jury find from the evidence that the application which the plaintiff made, or authorized to be made, to the defendant for the insurance in controversy, omitted or concealed any fact in the description of the premises material to the risk, then the plaintiff cannot recover. The sixth and seventh prayers were refused as offered, but granted with the modification :

But in considering these prayers the jury will take into consideration the nature and use of the property as described in the evidence.

8th. That the plaintiff is bound by the representation as to contributing insurance contained in its application, and if that representation was untrue the policy is void and the plaintiff is not entitled to recover.

9th. That even if the plaintiff should under any instruction of the court be entitled to a verdict, it can only recover upon the basis of contribution stated in the application.

10th. That there is no legal or competent evidence in this cause to

show that the plaintiff in this case had any legal insurable interest in the property mentioned in this cause as destroyed by fire, either at the time of the making of the said policy or at the time of its destruction by fire as testified to in this cause, and therefore the plaintiff is not entitled to recover.

11th. That the preliminary proofs shown by the evidence to have been furnished to the defendant by the plaintiff, are in themselves insufficient under the policy, and their verdict must consequently be for the defendant unless they find the facts to be true which are assumed as the basis of the plaintiff's first prayer granted by the court. And by the words "preliminary proofs," the defendant means to cover the certificate of a magistrate, notary public, or a commissioner, required by the tenth condition of the policy.

The defendant, by its counsel, objected to the first prayer by the plaintiff, because the evidence in the case was insufficient to support the proposition of law therein asserted, even if such proposition were law upon the hypothesis of facts that it assumed, which was denied.

The court (DOBBS, J) rejected the defendant's first, second, third, fifth, sixth, seventh, eighth, ninth and tenth prayers as offered, but granted the third, fifth, sixth and seventh with modifications, and granted as offered its fourth and eleventh.

To the granting of the plaintiff's first prayer, and to the refusal of the court to grant the defendant's first, second, third, fifth, sixth, seventh, eighth, ninth and tenth prayers as offered, the defendant excepted; and the verdict and judgment being for the plaintiff for \$2,348.78 etc., the defendant appealed.

R. J. BOULDIN AND JOHN CARSON, *for Appellant*,  
WILLIAM A. FISHER AND CHARLES MARSHALL, *for Appellee*.

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The cause was argued before BARTOL, C. J., STEWART, MILLER, ALVEY and ROBINSON, JJ.

BARTOL, C. J., delivered the opinion of the court.

This is an action of covenant on a policy of insurance issued by the appellant to the appellee "on their one story frame ice-house, situate detached on the line of the Chicago and N. W. R. R., at Crystal Lake, McHenry Co., Illinois."

No question arises upon the pleadings, all errors therein having been waived by agreement.

The first ground of defense relied on by the appellant, was the failure of the appellee to furnish the preliminary proof of loss in

manner and form as required by the tenth condition of the policy. The fire occurred on the morning of the 11th of August, 1869, and on the same day notice thereof was given to the agents of the appellant, who on the same day notified the appellant. Proofs of loss were made up and transmitted to the appellant within a reasonable time, but it is objected that they were defective and insufficient.

The appellee on the other hand contended that the appellant, by its conduct and proceeding after it had been notified of the fire and received the proofs of loss, had waived all objection thereto, and was precluded from objecting to their sufficiency. By the first prayer of the appellee (which was granted) the jury were instructed that if they should find from the evidence the facts therein enumerated, the appellant could not now object to the sufficiency of the proofs of loss or to the absence of a certificate as required by the tenth condition of the policy.

Distinct objection to this prayer was made in the court below, on the ground of the want of evidence to support it; and the same objection is urged in this court by the appellant, not because there was no evidence tending to prove the facts enumerated in the prayer, but because there was no testimony in the cause of an *express waiver*, as required by the eighth condition of the policy, without which, it is argued, the obligation to furnish preliminary proof in accordance with the tenth condition of the policy could not be released; and that an implied waiver would not be sufficient, and could not be shown in the face of the eighth condition.

Apart from the terms contained in the last clause of the eighth condition of the policy, there can be no doubt that the facts stated in the appellee's first prayer, if believed by the jury, would amount to a waiver of the defects in the preliminary proofs, and preclude the appellant from objecting to their sufficiency. *Allegre vs. Ins. Co.*, 6 H. & J., 412, 413; *Edwards vs. The Baltimore Fire Ins. Co.*, 3 Gill, 186; *Franklin Fire Ins. Co. vs. Coates & Glenn*, 14 Md., 294, 295; *Taylor vs. Merchants Fire Ins. Co.*, 9 Howard, 403, 404.

These decisions sufficiently show the principles which govern in ordinary cases arising under policies of insurance containing stipulations with regard to the preliminary proofs of loss to be furnished by the assured.

The difficulty in the present case grows out of the terms of the eighth condition in the policy, which is in these words: "Should the assured, in making application for insurance, submit a survey plan or description of the property herein insured, upon which this insur-



ance is effected, such application, survey plan, or description shall be considered a part of the contract, and a warranty by the assured. And any misrepresentation whatsoever, whether in written application or otherwise, or any omission to disclose and make known every fact material to this risk, will vitiate this policy. Nothing but a distinct specific agreement, clearly expressed, and indorsed on this policy, shall operate as a waiver of any printed or written condition, warranty, or restriction therein."

The effect of a provision of this kind in a policy of insurance was considered by the Supreme Court of Massachusetts, in *Blake vs. Exchange Mutual Ins. Co.*, 12 Gray, 265. The language of the very able judge who gave the opinion of the court is so apposite to this case that we quote it at length :

"How far the provisions as to the form of the notice and proofs of loss after a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves ; for it seems to us that the question is not as to the provisions of the contract, but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss the plaintiff sent to the defendant certain notices and proofs in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so—if they proceeded to negotiate with the defendant without adverting to the defects—if still further they put their refusal to pay on other and distinct grounds, they are upon familiar principles of law estopped to set up and rely upon the defective notices ; the law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary." After citing several authorities, the learned judge proceeds : "If the plaintiff relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification or addition by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the or-

dinary rules of law. There is a time when objections in matter of form must be taken. If they are not then made they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to and liberal application of this principle are necessary to the maintenance of good faith and fair dealing in judicial proceedings."

We concur in the reasoning of the court in 12 Gray, and consider it applicable to the present case. According to our construction of the last clause in the eighth condition of the policy, it refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated as *conditions*; and that it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing proofs of loss. These are not conditions inherent in the contract itself, but stipulations to be performed by the assured as preliminary to his right of action on the contract, or to the liability of the company to pay the loss. When we read this part of the eighth condition with the context, and construe the whole together, we are satisfied that it has no reference to the requirements with regard to the preliminary proofs of loss found in the tenth condition of the policy; and that it was not contemplated with respect to them that no defect or omission could be waived by the company without a written agreement to that effect indorsed upon the policy.

The cases of *Hale vs. Mechanics' Mutual Fire Ins. Co.*, 6 Gray, 169; *Forbes vs. Agawam Mutual Fire Ins. Co.*, 9 Cush., 470, and *Abbott vs. Gatch*, 13 Md., 314, cited by the appellant, seem to us to be inapplicable. In each of those cases the matters which the parties stipulated should be evidenced only by agreement in writing, constituted an integral part of the contract, essential to make it binding between the parties.

In our opinion there was no error in granting the first prayer of the appellee, and for the reasons before stated the second prayer of the appellant was properly refused.

The next question arises upon the first prayer of the appellant.

The witness, James P. Smith, Jr., (the president of the ice company,) stated in his testimony that the "ice-house was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition." The appellant contends, and by its first prayer asked the court to instruct

the jury that these facts, if believed by them, vitiate the policy under the memorandum printed thereon, entitled "Builder's Risk," which provided that the working of carpenters, roofers, tin-smiths, gas-fitters, plumbers, or other mechanics, in building, altering or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it.

We think that by a fair and reasonable interpretation of this article of the policy it cannot be understood as referring to the casual patching up of the building, such as spoken of by the witness ; but as prohibiting such hazardous use of the building as is generally denominated "*Builder's Risk*," which arises from placing it in the possession or under the control of workmen for rebuilding, alteration or repairs. To place upon it such a construction as contended for by the appellant would defeat the intent of the parties and be repugnant to the written clause of the policy *insuring the building*, which, looking at its size, structure, use, must have reasonably contemplated the necessity for such repairs as the witness described, as indispensable to the proper conduct of the appellee's business. The evidence shows that the building was two hundred and sixteen feet long and one hundred and forty feet wide ; that the height from the top of the sill to the under sill of the plate was twenty-six feet ; that the walls were of joists three by six inches, hollow, two feet thick, filled in with tan ; the materials all wood, bound with iron. There was a balcony round the upper part of the house, and an inclined plane or tramway, fourteen feet wide, extending from the lake to the plate of the ice-house, on which the ice was dragged up by horse power. The capacity of the house was *twenty-four thousand tons* of ice. It is very obvious that a building so constructed would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business of the appellee that breakages should be repaired as they occurred ; all of which was known to the appellants, and will be presumed to have been in their contemplation at the time the contract was made and permitted by the written terms of the policy insuring the premises as an ice-house.

For the principles governing the construction of policies of insurance we refer to *Harper vs. the Albany Mutual Insurance Co.*, 17 N. Y., 194, and *Washington Fire Insurance Co. vs. Davison & Symington*, 30 Md., 92, 107, 108.

We think there was no error in refusing the appellant's first prayer. And upon the same principle the modification made by the

court below in the appellant's *third*, *sixth* and *seventh* prayers is free from objection.

The modification added to the appellants' *fifth* prayer stated the law correctly, and though it appears to have been excepted to below, it has not been made a ground of objection in the argument in this court.

The appellant was not entitled to have its eighth prayer granted, as there was no evidence whatever of any misrepresentation as to contributing insurance made at the time of the contract.

The proposition asserted in the *ninth* prayer, that the assured was obliged to continue the same insurance on the property as existed at the time of the application, is erroneous, and was properly rejected. There was no such warranty in the policy. *Forbush vs. Western Massachusetts Insurance Co.*, 4 Gray, 388.

The appellant's *tenth* prayer was also properly refused. It asks an instruction to the jury "that there is no legal and competent evidence in the cause to show that the plaintiff had any legal insurable interest in the property mentioned as destroyed by fire, either at the time of the making of the policy or at the time of the fire."

The proof in the cause is that the appellee was in possession of the property, claiming and occupying it as its owner. This is *prima facie* evidence of title. "A person in possession of land is *prima facie* presumed to be seized in fee." 1 Phillips on Evidence, 646, and note. In the absence of proof of an outstanding title in others, or any incumbrance upon the property, this *prima facie* presumption of a seizin in fee, growing out of the occupation by the appellee as owner of the property, was sufficient to show an insurable interest therein, and consequently there was no error in rejecting the tenth prayer of the appellant.

There appearing to be no error in the rulings of the court below, we affirm the judgment.

Judgment affirmed.

## SUPREME COURT OF WISCONSIN,

JUNE TERM, 1872.

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*Appeal from the Circuit Court of Winnebago County.*

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MORSE AND OTHERS, *Appellees*,

vs.

BUFFALO FIRE AND MARINE INS. CO., *Appellant*.\* }

The company issued a policy upon the steamer Berlin City, insuring her against loss or damage by fire. The policy provided that if gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude or refined coal or earth oils, were kept or used on the premises without written consent, the policy should be void.

In an action upon the policy it appeared that kerosene oil was used to light the cabin and saloon of the boat after the insurance was effected.

The maxim *noscitur a sociis* is applicable here, and the term "refined coal or earth oils," as used in the policy, should be construed to mean only those articles or substances which are included in such general description, and which are also as highly inflammable, and therefore as dangerous to the insured property, as naphtha, benzine or benzole.

The fact that neither the agent of the company nor the insured at the time the insurance was effected understood that the use of kerosene on the boat for illuminating purposes was prohibited by the conditions of the policy, supports the construction of the contract, which does not make the prohibition in the policy apply to the use of kerosene.

If the language of the policy may be understood in more senses than one, it is to be interpreted in that sense in which the company had reason to suppose the plaintiffs understood it.

Even were it doubtful whether the term "refined coal or earth oils" was used in an enlarged or restricted sense, other things being equal, the restricted construction should be adopted as being most favorable to the plaintiffs, who, in respect to the insurance company, stand in the position of promisees.

The contract should have a reasonable construction, reference being had to the circumstances under which it was made.

Where the intent is doubtful, conditions providing for forfeitures are to be construed strictly, against those for whose benefit they were introduced.

The party to a contract who seeks to destroy its obligations by reason of an al-

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\* Decision rendered June Term, 1872.

leged breach of a condition precedent by the other party, cannot establish such a condition by inference or conjecture. The terms of the contract must be clear and explicit in his favor.

Unless it appears that the appeal was clearly frivolous, and that it was taken from sinister and improper motives, damage beyond seven per cent. per annum on the judgment, as provided by statute in cases where the appeal is taken to harass and delay the plaintiff, will not be awarded. Judgment affirmed.

FELKER & WEISBROD, *for Appellant.*

GABE BOUCE, *for Appellees.*

LYON, J.

This is an action upon a policy of insurance issued by the defendant to the plaintiffs upon the steamboat "Berlin City," insuring the same against loss or damage by fire. The policy contains the following condition: "If gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude or refined coal or earth oils, are kept or used on the premises without written consent, this policy shall be void." Kerosene oil was used to light the cabin and saloon of the boat after the policy was issued, and it is claimed this was a violation of the above condition of the policy and rendered the policy void. The Circuit Court held otherwise, and directed the jury to return a verdict for the plaintiffs for the amount of the policy. It was admitted by the defendant that the boat had been burned, and that if the plaintiffs were entitled to recover any sum they were entitled to recover the full amount of the policy.

The defendant has appealed to this court from the judgment against it entered pursuant to such verdict.

It is conceded that the judgment should not be disturbed unless the use of kerosene oil on the boat as aforesaid invalidated the policy; and whether the use thereof had that effect by the terms of the policy is the only question to be determined on this appeal.

We suppose it will not be disputed that naphtha, benzine, or benzole and kerosene, are all "refined coal or earth oils," not differing in their nature, but only in the degree of inflammability, kerosene being much less inflammable than either of the others. From this it would seem to follow that if a broad and general construction be given to the term "refined coal or earth oils," it must be held to include kerosene, and that the use of that article on the boat vitiated the policy and terminated the contract of insurance. But we are of the opinion that the term should not be so construed. It is used in connection with naphtha and benzine or benzole, kerosene not being specific-

ally named as one of the articles the use of which will vitiate the policy. The object and purpose of the condition undoubtedly is to decrease the danger of loss by prohibiting the keeping or use of highly inflammable substances, such as naphtha, benzine or benzole, upon the premises insured. The policy expressly enumerates those articles of that character which are more commonly used, as gunpowder, camphene, spirit-gas, naphtha, etc., and then, to fully carry out such purpose and object, and to protect the insurance company from the danger of loss by reason of the keeping or use of other articles of like character and equally dangerous, it specifies in general terms as included in the prohibition, "chemical, crude or refined coal or earth oils." Hence any article of like character and equally dangerous as those enumerated, although such article is not specifically named in the policy, is within the prohibition. Further than this we do not think the scope of these general terms in the policy should be extended. In other words, we think that the maxim *noscitur a sociis* is applicable here, and that the term "refined coal or earth oils" as used in the policy, should be construed to mean only those articles or substances which are included in such general description, and which are also as highly inflammable, and therefore as dangerous to the insured property, as naphtha, benzine or benzole. An illustration of the application of this maxim may be found in Broom's Legal Maxims, p. 451, which is so directly in point that we feel justified in inserting it here entire. It is as follows :

"One instance of the application of the maxim *noscitur a sociis* to a mercantile instrument may however be mentioned on account of its importance, and will suffice to show in what manner the principle which it expresses has been made available for the benefit of commerce. The general words inserted in a maritime policy of insurance, after the enumeration of particular perils, are as follows : And of all perils and misfortunes that have or shall come to the hurt, detriment or damage of said goods and merchandises and ships, etc., or any part thereof.

"These words, it has been observed, must be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words ; they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument, and this will be done by allowing them to compre-

hend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes, that is to say, *the meaning of the general words may be ascertained by referring to the preceding special words.*"

So in the present case the construction which we have given to the general words makes them operative to prohibit the keeping or use on this boat of articles not covered by the special words of the policy, while at the same time, by referring to the special words to ascertain the meaning of the general words, we give full force and effect to the former. A different rule of construction would render the special words entirely superfluous, for if the term "refined coal or earth oils" be construed in its broadest and most general sense, surely it includes naphtha and benzine or benzole, and the special enumeration of these in the policy adds nothing to its obligations, and does not in any manner affect the contract of insurance.

There are many other rules of law for the construction of contracts which are applicable to the question under consideration, and which it is believed demonstrate that we have correctly interpreted this contract of insurance. Brief mention will be made of some of them.

1. The contract should be construed in accordance with the intention of the parties to it. Aside from the general words employed therein, this policy contains nothing to show that kerosene was intended to be included in the list of prohibited articles. It contains, however, a stipulation that the insurance company shall not be liable for a loss caused by "explosions of any kind." This would doubtless in most cases of losses which originated by the burning of kerosene, relieve the company from liability therefor. It is difficult to perceive how a loss could thus originate without an explosion of greater or less force. This clause in the policy would seem to protect the company from the consequences of the improper or careless use of kerosene, and when considered in connection with the fact that kerosene is not specially named as one of the prohibited articles, it raises a presumption that the use of it was not intended to be prohibited. If we may look for the intent of the parties outside of the language of the policy—if it is admissible to ascertain that intent from the situation of the parties, the character of the property insured, and all of the attending circumstances, then it becomes perfectly apparent that neither the plaintiffs nor the agent of the defendant who negotiated for it the contract of insurance ever supposed for a moment that the use of kerosene on the boat for illuminating purposes would terminate the contract and render the policy void. It was admitted on the tri-



al that kerosene had been in general and universal use for illuminating purposes on boats and in buildings outside of gas districts for ten years, and the agent of the defendant testified that he did not understand, when the contract was made, that the use of kerosene was prohibited by the policy. The circumstances of the case show conclusively that the plaintiffs understood the policy as did the agent. Had the agent pending the negotiations informed the plaintiffs that the use of kerosene on their boat would destroy their insurance, does any one believe that they would have paid the premium and taken the policy? Were an insurance company to say to the public in plain English that the use of kerosene for illuminating purposes on the premises insured by it would destroy the insurance and forfeit the policy, we apprehend that such company would thereafter issue but few policies, and that future dividends to its stockholders would be exceedingly small.

2. If the language of the policy may be understood in more senses than one, it is to be interpreted in the sense in which the defendant, the insurance company, had reason to suppose the plaintiffs understood it. In that sense we believe we have interpreted it.

3. Even were it doubtful, from the general tenor of the policy and the relation of the parties, whether the term "refined coal or earth oils" was used in the policy in an enlarged or restricted sense, other things being equal, the restricted construction should be adopted as being most favorable to the plaintiffs, who, in respect to the insurance company, stand in the position of promisees.

[Concluded in September Number.]

## MISCELLANEOUS DEPARTMENT.

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### EMOTIONAL INSANITY.\*

Is there such a thing as emotional insanity, and if there be, does it excuse an act otherwise criminal? These questions depend upon another, more general, that is to say—What is insanity in its relation to crime? Satisfactory answers would be, as we all know, of inestimable service in the administration of criminal law; and the aim of this paper is to contribute, whatever I may be able, toward their careful consideration. My point of view is, of course, the legal side of that two-fold science which we call Medico-Legal, or, as I should prefer to express it, "Medical Jurisprudence." The pathology of insanity is beyond my province.

A crime is an act or omission forbidden by law, to which is annexed, upon conviction, a certain punishment. Our present inquiry relates solely to human law and human punishment. The element of religion or morals does not enter into the question. No reference is made to a violation of the moral or divine law, however great may be the guilt or awful the punishment. For the present hour, we are concerned only with a violation of those laws which depend upon human sanction; and when I speak of the relation of insanity to crime, I mean the relation which it bears to a violation of the law of the land. Punishment is something annexed to crime, as a consequence, painful to the offender; or, in other words, a penalty which he is to suffer for his violation of the law. What is the theory upon which punishment is inflicted? It is not to avenge. "Vengeance is mine, saith the Lord." "To me belongeth vengeance and recompense." The purpose of human punishment is neither revenge nor attribution, but the enforcement of the laws. This is effected by annexing a penalty to their violation. The penalty operates not by way of satisfaction, but prevention. The object is to deter. The threat of pun-

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\* This paper was read by Mr. David Dudley Field, April 24th, 1873, before the Medico-Legal Society of New York.

ishment is addressed to all. An instance of punishment has a two-fold operation, first, upon the offender to deter him from a repetition of the offense, and then upon others like him to deter them by force of his example. The measure of a just punishment is, therefore, that kind and degree, which are necessary to such an end.

The rightfulness of punishment depends solely upon its necessity. The test is not the greater or less ill deserving of the offender, but the safety of society. Laws are made for the protection of rights. If it be necessary to have laws, it is necessary to enforce them. *Necessitas quod cogit defendit.* Show me that a certain rule is necessary to the public good, and that a certain punishment is necessary to the enforcement of the rule, and I accept the conclusion as irresistible, that this punishment may be rightfully inflicted. The authority to take human life can only be justified by such a course of reasoning. The argument embraces not only penal laws, but all human conduct. If four men are at sea in an open boat, three of them struggling to reach the land, and the fourth, maddened by distress, insists upon upsetting the boat, the three may rightfully throw him into the sea. When Sir John Franklin, on his perilous journey in the frozen zone, shot one of his men who showed signs of mutiny, danger to the rest, he exercised an inherent right to protect the company which he was trying to lead to a place of safety. Every age of the world has seen monsters, *hostes humani generis*, whom it was justifiable to exterminate. So, in all regular government, the safety of society is the warrant which the Almighty has given for the punishment of those who infringe its laws. This necessity is not only the warrant, but the limit of the power. For useless punishment is itself crime.

Starting from this point we enter upon the question of insanity in its relation to criminal responsibility. I say in this relation, because here lies the first distinction which it is necessary to bear in mind. There may be a degree of the disease which requires that the patient should be shut in a lunatic asylum, or which would invalidate his contract or his testament, but which, nevertheless, would not absolve him from the charge of criminal offense or its consequences. Our statutes may declare as they do, that "no act done by a person in a state of insanity can be punished as an offense, and no insane person can be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state." But this is general language which needs qualification, in its application to the facts of particular cases.

It is curious to observe with what different views different persons

regard the question of insanity. The lawyers do not agree with the physicians, or among themselves. The physicians do not agree with one another. Scarcely any two writers, or, for that matter, any two judges, agree upon the same definition or test. This strange disagreement it may be worth our while to illustrate by a few examples :

[The views held by the judges respectively in the cases of Mo-Naughton, Huntington, Sickles, Willis, Wagner, Cole, MacFarland, Montgomery and Scannell, and by the writers, Balfour Browne and Mittermaier, are here quoted.]

The various definitions of insanity contained in the extracts that I have here given not only differ among themselves, but fail, as I think, to furnish a true and plain rule for judicial investigation, such a rule as would be scientifically exact, and, at the same time, easily understood by juries.

It may be rash for me to try where so many have failed ; but, unless there be trial, there cannot be accomplishment, and it is the privilege of all to endeavor, though only one may succeed. Let me then offer my contribution to the work of this society, by, helping, even though it may be in a small degree, to answer a most important and interesting question.

It appears to me that the true answer is to be evolved out of the theory which I have given of crime and punishment. The ideas of crime and punishment are correlative. That only is crime to which punishment is annexed as a consequence, and everything to which punishment is annexed is criminal. Crime being, as we have seen, an act or omission forbidden by law, to which punishment is annexed, and the object of punishment being to deter, it should seem to follow that punishment is to be inflicted only when it will be likely to deter. But the rules of law are general, and must provide for punishment upon general considerations. It should annex a penalty to an injurious act whenever, according to the general experience and judgment of mankind, the penalty will deter the actor from the repetition of the act, and others like him from imitating it. If it will probably have that effect, society may inflict the punishment ; if not, not. The question, then, of insanity, in relation to criminal responsibility, is not merely whether the offender is of unsound mind, but whether his unsoundness is of that kind and degree that he would not, according to the general experience and judgment of man, be deterred by punishment from a repetition of the act, if committed by himself, or from committing it, if seen by him to be followed by punishment when committed by others. And all this depends upon the question

whether the offender was or was not a free agent; that is to say, whether he acted from compulsion so strong that the fear of punishment could not withstand or overcome it. There must have been freedom of choice between doing and not doing, and capacity to choose. Since the object of punishment is, as I have said, to deter an offender and others like him, and since one can be deterred so far, and so far only, as his act is voluntary, the question of legal responsibility must come to this—was the person accused capable of knowing that the act or omission was a violation of law, and of refraining from it? Was he *capable of knowing and refraining*? I do not ask whether he *did know*, but whether he was *capable of knowing*. If he was *capable of knowing* and of *refraining*, then he was, in the sense of the law, a free agent. The points to be submitted to a jury are, first, was he *capable of knowing* that what he was about to do was a violation of law; and being thus capable *could* he have refrained from doing it, or, to use a common phrase, “could he help it;” and I venture to say, that upon these two ultimate questions hangs the decision of the issue of insanity in criminal cases.

The questions assume, of course, that the offender is of the age of discretion, and being thus advanced in years is not below it in mind. Children under seven years of age, and idiots, are not within the scope of criminal law, though they can be operated upon by motives and restrained by punishment. Two boys, five and six years old, playing together, we will suppose, have been taught that one must not strike the other, or, if he does, that he will be punished for it, and, ordinarily, this knowledge will control him; but if one should happen to strike a blow, causing death, no one would think of hanging or imprisoning him for it. Why? Because the fear of such a punishment would have no greater effect in deterring the child than the slight discipline of the nursery. It is not that he does not know the act to be wrong, or that the fear of punishment would not, in most instances, deter him from striking his companion, but because his reason is too feeble, and his will is so little under subjection to his reason that a sudden impulse overcomes him. You may even suppose that he intended to kill, not from malevolence, but from curiosity or an imagination excited by stories of killing, but he has no idea of death as a consequence of the blow; and if he had, as a small object present is stronger with him than a great one future, so an impulse of the moment upon his feeble mind overcomes any idea of consequences at a distance. The same reasoning which would exclude a child from the scope of criminal law would exclude also an idiot or an im-

becile. There must be a capacity to reason, and a power of reason over the will sufficient to deter.

Excluding, then, children under the age of discretion, idiots and imbeciles, as not within the range of our immediate inquiry, I recur to the question of insanity in reference to other persons, and taking the rule of criminal responsibility as I have stated it, let us apply it to the different stages of mental disease. In doing so we should bear in mind that whatever be the true rule, it is, in the present state of the law, applicable to every kind of crime and punishment, whether the crime be in act or omission, or the punishment be death, imprisonment or fine.

And here let me observe that I think much of the difficulty, in regard to the defense of insanity, has arisen from the desire to escape the extreme punishment of death. The mind shrinks from taking the life of one who may, by possibility, be guiltless of intentional wrong, and catches at any plausible excuse for treating the case as one of insanity. We should, however, not be influenced by such considerations, and must treat the question as independent of particular punishments. If insanity is a defense when the charge is murder, it is also a defense when the charge is harboring a fugitive slave, or smuggling goods over the frontier.

Insanity, in its general pathological sense, is thus defined by Dr. Hammond, than whom there is no higher authority: "As no two brains are precisely alike, so no two persons are alike in their mental processes. So long, however, as the deviations are not directly at variance with the average human mind, the individual is sane; if they are at variance, he is insane." The medical profession thus pronounces that person insane whose mental processes are directly at variance with the average human mind. Now, whatever may be the real essence of the mind, we know it only by its phenomena, and these manifest themselves in four different forms, namely: In the perceptive faculties, the reasoning faculties, the emotional faculties, and the executive faculties; or, in other words, the perceptions, the reason, the emotions, and the will. Under the head of emotions, I place the passions, the appetites and the affections. Thus say the medical faculty, that person is insane whose mental processes are directly at variance with the average human mind, in respect either to his perceptions, his reason, his emotions or his will; that is to say, there may be perceptive insanity, intellectual insanity, emotional insanity and volitional insanity. I have not time to give instances as illustrations of the different kinds of insanity. It is enough to say

that in perceptual insanity those parts of the brain only are disordered which are concerned in the formation of perceptions, and it consists entirely in the formation of false perceptions, which are designated as illusions or hallucinations, as they proceed from without or from within. In intellectual insanity, the essential feature is delusion or false belief, in respect to material objects. In emotional insanity, the emotions paralyze or dominate over the intellect or the will ; and, in volitional insanity, the will has passed beyond the control of the intellect.

This is the medical side of insanity. Now, let us look at the legal side. Here the question is, not whether there is insanity in a medical sense, but whether there is that kind and degree of it which, as a general thing, would make punishment useless, considered as a motive to deter. Have we not the key to the answer in what has been already said? The will is the executive department of the mind. Whenever a crime is committed, or the temptation to commit it is resisted, the commission and the resistance are acts of the will ; and whenever the will acts in resistance of temptation, it acts in obedience to the reason. The temptation generally comes from the perceptions or the emotions ; the resistance from the reason and the will. It is the will which executes and the reason which guides. Choice is an act of reason. Execution is an act of the will. Whenever, in respect to a particular transaction, the subject of a criminal investigation, we find reason left sufficient to retain the power of choice, and control of the reason over the will sufficient to make it obey, then the person charged is in the eye of the law responsible for his acts, and amenable to punishment.

Such is the rule which appears to me philosophical and easily intelligible. It should seem thence to follow that though there be such a kind of insanity as perceptual, and also such a kind as emotional, yet that neither of them, taken by itself, nor both together, can justly exculpate the offender, or relieve him from punishment. For example, if a person suffering under perceptual insanity thinks he sees an angel, and hears a voice as of the voice of God commanding him to kill his child, and acts in obedience to the supposed command, I insist that, nevertheless, he should be punished for it. So, if a person suffering under emotional insanity, caused by brooding thoughts of intolerable wrong, real or fancied, shoots his enemy in the street, I would deal with him in the same way ; and so I would deal with one who, under a morbid, or, as it is sometimes called, irresistible impulse, pushes another over the side of a ship, or over a

precipice. Such impulses should not be accounted uncontrollable. I commend the answer of that sturdy English judge who, when told that the defendant had committed homicide under an irresistible impulse, replied that the law of England had also an irresistible impulse to punish him for it. Many persons have a morbid impulse to leap from a high rock, but they can restrain themselves. There are thousands who cannot lean out of a window without feeling an impulse to throw themselves to the ground. The drunkard has a morbid impulse to drink. He who uses tobacco to excess is, in common parlance, mad for it, but none of them is beyond accountability for the indulgence of these impulses and desires.

The government of insane asylums is a standing contradiction of some prevalent theories respecting insane criminals. It acts upon the assumption that the unsound of mind are influenced by motives and can be restrained by fear. One of the most eminent of our physicians, on being asked by me whether the insane are not affected by the fear of punishment, answered : "Yes, there is scarcely one of them who, if he wasted his butter, and were told that if he wasted it again it would be taken from him, would not refrain from doing so."

Bucknill, on this point, makes the following observations : "On the other hand, freedom of will, the fountain head of responsibility, is interrupted by the cerebral disease, but not wholly interrupted. If strong motives are addressed to the patient, he is capable of controlling the manifestations of the malady under which he suffers." "I am convinced," says Langerman, "that even in the highest degree of insanity there still remains a trace of moral discrimination with which we may connect the train of the patient's ideas. The extent to which the insane are capable of controlling their actions is conspicuous in the wards of a well-ordered lunatic asylum. The medical officers of such an institution find some two or three per cent. of the patients whom no moral influences appear to touch ; but the vast majority are enabled, with a little encouragement and assistance, to control their passions and emotions with nearly as much success as the people out of doors."

The law contradicts itself moreover in a remarkable manner. It will not excuse a man who violates it ignorantly, even though the act done be harmless in itself, as for example, ferrying without a license, or buying lands in suit, both of which are misdemeanors ; nor will it excuse one who, in a fit of intoxication, commits an act of violence upon another. The reason given for the former is, that all are bound to know the law, though ignorance may enter into the question of



motive. He who does not know whether an act is contrary to law has not a knowledge of right and wrong, as determined by the law in reference to that act. So the reason given for the latter is that the offender made himself drunk, but the punishment inflicted is not for getting drunk, for that is only a slight fine, but for the greater offense, the law taking no account of the mental disturbance which the intoxication has wrought. Then the insane are, with rare exceptions, admitted as witnesses ; but witnesses who swear falsely are amenable to the charge of perjury, and it would be absurd to allow one to testify, and by his testimony to cause another to lose his estate or his life, and yet, when the witness is called to account for his testimony, to excuse him on the ground that he was insane.

My position then is, that emotional insanity does not excuse an act otherwise criminal. In saying this, I consider emotional insanity by itself. I might say the same thing of perceptual insanity. Neither of these forms, considered by itself, or in connection with one another, exculpates an offender ; but I by no means assert that either, or both, may not lead to or be mingled with those other forms of insanity which do exculpate.

The dispute into which the defense of emotional insanity has fallen is owing to the fact that this form of the disease has been put forward as a defense by itself ; but it must not be forgotten that it may and does often lead to the other forms, viz. : Those of intellectual or volitional insanity. Bucknill says : " Of late years the opinion has been gaining ground among the best psychopathists that, with few exceptions, the embarrassment of the intellect is secondary and consequent upon the disorder and perversion of the emotive faculties." \* \* \* " Insanity is always in the first instance emotional." \* \*

" Intellectual insanity is always secondary." And in another place he says : " Sound philosophy points to the emotive part of our nature as the common if not the only source of mental disease."

Intent is a necessary ingredient of crime. There must be a union of act and intent. What is here meant by intent ? Not the intention to do a moral wrong, as judged by the conscience of the actor, but an intent to do the act which the law pronounces wrong. This intent the actor must be capable of forming, before he can commit a crime and be justly subject to punishment.

It must never be forgotten that insanity is a disease, and whether it be scientifically accurate to say that the *mind* is diseased, it is true that whenever there is insanity there is a disease of the brain, so that if the brain is not diseased, there is no insanity. This consideration

disposes of all those cases in which the act is done in the heat of passion or in a moment of frenzy. There are few homicides committed, except in passion or frenzy. A murder in cold blood, deliberated on beforehand, is a rare occurrence ; but no matter how hot the passion, or how fierce the frenzy, that is not insanity ; and the question comes at last to this—Was there a disease of the brain ? which is to be proved, like any other fact, by those competent to testify in the matter.

I cannot leave the subject of this paper without expressing my earnest conviction that the knowledge of mental disease has now arrived at such a degree of accuracy that there should be a new classification of punishments. The present classification is a great improvement, doubtless, on its predecessors, which were the product of a ruder age ; but we have not yet, by any means, reached that perfection of classification which the present state of our knowledge justifies and requires. The quality of the act, as measured by the degree of intelligence, should enter into the question of the degree of punishment, and while it may be true, as I have already said I think it is, that perceptual and emotional insanity should not exempt from punishment, I still think that the punishment should be graduated more than it is, according to the mental condition of the offender. It does not accord with our notions of justice, that the strong and hardened ruffian, and his weak and greatly tempted brother should, for the same outward act, suffer the same punishment. What I contend for is this, and this only, that emotional insanity should not exempt from punishment, and that so long as the law affixes only one degree of punishment to the outward act which the offender has committed, whatever may be the inward thought, that degree of punishment should be inflicted.

And I must also think that, whenever the administration of the law is brought to that state to which our advancing civilization must bring it, the question of insanity will be separated from other questions, and medical men will sit with the judges as assessors or experts, to aid the decision, in some such manner as nautical men now sit in the English Admiralty upon cases of collision.

Having passed thus rapidly over this vast field of inquiry, we are able, I think, to state the following propositions as the results :

1. Children under the age of discretion, idiots and imbeciles are not within the discipline of criminal law.
2. The mental unsoundness of other persons, commonly designated as insanity or mania, is, in itself, or is attended by, disease of the

brain, so that no heat of mere passion, and no degree of mere frenzy can in any just sense be pronounced insanity by either of the professions.

3. That neither perceptual nor emotional insanity by itself, nor both together, can be accepted as excuse for criminal responsibility.

4. That intellectual or volitional insanity absolves from criminal responsibility when, and only when, the reason has lost either the power of choice, or the power of controlling the will.

5. That in every case of acquittal on the ground of insanity, the defendant should be forthwith placed in a lunatic asylum, and there kept until it is proved that he is restored to such a state of sanity as to remove all apprehension of a recurrence of the disease.

6. That the present gradation of punishments is unsuited to the present condition of medical learning, and a change is required which shall make the law punish, not only according to the harmfulness of the outward act, but according to the quality of the inward spring of action.

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#### CASES REPORTED.

The present number of the JOURNAL contains a full report of the decisions in six insurance cases, besides that of *The Mutual Life Ins. Co., of New York, vs. Terry*, which is concluded from last number.

*The Knickerbocker Ins. Co., of Chicago, vs. Comstock et al.*, was decided in the United States Supreme Court. The action arose upon a petition in bankruptcy. The court held that moneyed, business and commercial corporations are as much within the provisions of the bankrupt act as unincorporated individuals or associations; that the company, respondent, had a right to have its exceptions to the rulings and instructions of the District Court re-examined in the Circuit Court, and that the Circuit Court erred in dismissing the writ of error for want of jurisdiction. The court however held that the respondent should have petitioned for a mandamus instead of suing out a writ of error to the Circuit Court, and that mandamus being the proper remedy, error would not lie.

In *Holabird vs. The Atlantic Mutual Life Ins. Co.*, the United States Circuit Court for the Eastern District of Missouri held that if the

statements in an application for a life policy are untrue, it is immaterial whether they are intentionally so or not, or whether the facts inquired into, if known, would have caused the risk to have been considered more hazardous, or whether diseases denied contributed to the death. The court also held that as such statements are presumed to be true, the burden of proving them untrue is upon the defendant who controverts them. The court decided that marriage in Missouri may be contracted by the present mutual consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities.

The case of *Arkansas M. F. etc. Ins. Co. vs. Bostick et al.*, arose on an open policy on goods "lost or not lost." Goods were shipped from Louisville to the plaintiffs at Fort Smith, and were destroyed by fire April 9th. The plaintiffs received the invoice April 11th, and had them indorsed on the policy the next day by the agent at Fort Smith, who sent his report to the company at Little Rock, where it was received April 14th. Neither the plaintiffs nor the agent knew of the loss at the time the indorsement was made, but the company had heard of it before the receipt of the agent's report, and afterward rejected the report and cancelled the policy. The court held that the company could make itself responsible for a loss that had already occurred, even if the loss was total, so that the subject matter of the insurance was not then in existence, and that by the clause "lost or not lost" it did make itself so liable. The court also held that the company was estopped from any defense on the ground of variation, although its agent had indorsed the goods from Memphis instead of from Louisville. The judgment in favor of the plaintiffs was affirmed. The case was decided in the Supreme Court of Arkansas.

In *Payson, assignee of the The Republic Ins. Co., of Chicago, vs. Withers*, the United States Circuit Court for the District of Indiana, in a suit on a stock note given to the company by the defendant, held that a statute of Indiana prohibiting insurance companies of other States from doing any ordinary business in the State until they had filed certain papers with the county clerk, did not prohibit the company from taking subscriptions for stock of the company and from receiving notes for the stock sold, and that the claim of the defendant that he relied upon the representation of the agent that no more than twenty per cent. would ever be assessed against him, cannot avail against the terms of the charter agreed to in writing. The court also discussed the extent to which the legislature can go in changing a company's charter by amendments, and the effect upon the plaintiffs

liability of an amendment made after the subscription, changing the amount of the capital stock and the manner of electing the board of directors, and also the effect of an increase of the capital stock by the directors before the amendment. Judgment was rendered for plaintiff.

In *The Franklin Fire Ins. Co. vs. The Chicago Ice Co.*, the Court of Appeals of Maryland decided that a provision that nothing but a distinct agreement indorsed upon the policy should operate as a waiver of any condition therein, referred only to those conditions of the policy which enter into and form part of the contract of insurance, and that it has no reference to those stipulations which are to be performed after loss has occurred, and that the company had by its acts waived the requirements of the policy in regard to proofs of loss. The court also held that the possession of property by a person claiming to be its owner is sufficient evidence of an insurable interest therein, and that the clause in the policy, entitled "Builder's Risk," did not include the repairs made necessary by the damages occasioned by ordinary business. The judgment of the court below for the ice company was affirmed.

The case of *Morse et al. vs. Buffalo F. and M. Ins. Co.* was decided in the Supreme Court of Wisconsin. The main defense was that kerosene had been used upon the boat in a violation of a provision in the policy which prohibited the use of naphtha, benzole, and crude or refined coal or earth oils without the written consent of the company. The court lays down the principles upon which contracts of this kind are to be construed, and holds that the maxim "*noscitur a sociis*" applies, and that the use of kerosene was not prohibited by the terms of the policy. The judgment in favor of the plaintiffs was affirmed. A part only of the opinion is given in this number, the remainder will appear next month.

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## MISCELLANEOUS.

### INSURANCE REPORT OF MAINE.

Hon. A. W. Paine, insurance commissioner of Maine, in his 5th annual report for the year ending, December 31st, 1872, states that during the year 45

home, and 105 other companies did business in the State. The commissioner congratulates his fellow-citizens upon the workings of the insurance department. Since its existence, with the exception of the companies overwhelmed in the Chicago and Boston experience, but one company of all admitted to the State has failed. During four years, be-

gining with 1868, the ratio of losses to premiums has been 58 per cent., being  $3\frac{1}{4}$  per cent. less than the average of companies operating in New York, and 10 per cent. less than the companies operating in Massachusetts. The commissioner concludes, in view of the Boston lesson, that the larger the company and the wider the territory over which it operates, the better and safer it is. Greater care is also needed in avoiding the accumulation of risks within the same exposure. Concerning the true definition of a common exposure, the commissioner holds that the "judgment must be formed from the *possibilities* rather than the *probabilities* of contagion." The joinder of fire and marine business in the same company, is deprecated in consequence of their dissimilarity. In reference to life insurance the commissioner holds, that the premium should be specific, "and that each person be allowed the benefits, or made to bear the misfortunes of his own case," and that all persons should be embraced in the insurable class; the feeble and sick, paying of course, more than the strong and well. Attention is called to the magnitude of the insurance interest. Fire risks to the amount of ten thousand millions, and life risks to more than two thousands millions of dollars, are assumed by companies having more than three hundred millions of dollars capital and assets. The commissioner believes governmental supervision over this great work is especially needed. In retiring from the department, over which he has presided from its initiation, Mr. Paine expresses himself courteously toward all with whom he has come in contact professionally, and in closing notices apparently as worthy of special emphasis the comparative expense and income of the department during the current year—the income being \$3,790 and the outgo, including all salaries &c., being \$2,669.

#### INSURANCE REPORT OF KENTUCKY.

The insurance commissioner of Kentucky, from time to time during the past year, has issued several special reports having reference to particular transactions. His regular annual report, containing a full exhibit of all insurance business for the year 1872, has recently been published. Fire insurance is by far the principal part thereof, there being but two life companies operating in the State. On the 31st, December, 1872, seventy-eight fire and marine insurance companies were doing business in the State by authority. Of these, fourteen were Kentucky companies, fifty-nine were companies of other States, and five of foreign countries. The commissioner summarizes the business of these companies as follows: Their aggregate capital is \$25,861,516.85; aggregate net surplus, \$2,268,527.36; aggregate regular cash income is \$47,308,703.62; aggregate expenditure, \$50,463,869.09; ratio of expenditures to income, 107 per cent.; aggregate fire losses paid, \$33,651,371.29; aggregate fire premiums received, \$43,437,652.27; average ratio of fire losses paid to fire premiums received, 77 per cent.; aggregate marine and inland losses paid, \$3,607,877.19; aggregate marine and inland premiums received, \$4,934,952.87; average ratio of marine and inland premiums received to marine and inland losses paid, 73 per cent. Premiums paid for fire and inland insurance by Kentucky policy-holders during the year 1872, amount to \$1,216,748.36; losses paid during the year, \$509,930.27; the losses paid being 42 per cent. of the premiums received.

#### ARKANSAS INSURANCE LAW.

In Arkansas, on the 25th of April, 1873, an act was approved establishing an Insurance Bureau. The commissioner

in charge thereof is appointed by the State auditor for a term of three years, at a salary of \$2,500.00. He is required to give a \$10,000.00 bond, and to see that the provisions of the law are executed. He shall calculate the value of life policies upon the basis of the American Experience Table of Mortality, and four and one half per cent. interest per annum. If any life company shall not have on hand the net value of all its policies, the fact shall be published by the commissioner. Concerning companies of other States, the valuations of their respective commissioners shall be accepted. In calculating values in fire insurance he shall take 50 per cent. of the premiums received on unexpired risks that have less than one year to run, and a *pro rata* on those having more than a year to run. In marine and inland insurance he shall charge all the premiums received on unexpired risks. When the reinsurance reserve however is less than 40 per cent. of all the premiums received during the year, all the premiums received shall be charged. No company shall allow its capital stock to become impaired to the extent of 20 per cent. Discretion, however, is lodged with the commissioner in determining whether any such company shall continue to do business. Whenever it is desirable the commissioner shall publish the condition of any company. For the purpose of ascertaining that condition he is invested with full powers of visitation, both at home and in other States. An actuary is employed at a compensation of three cents per thousand dollars of insurance, to be defrayed by the company for which the valuation is made. The customary fees for filing charters, etc., are charged. In case the expenses of the bureau exceed the income, the deficit shall be charged in just proportion to the companies doing business. By the first of August every insurance compa-

ny shall file a certified copy of its charter, and a certificate of organization. For neglect of this a fine is due. To enable them to do business, insurance agents must obtain a certificate of authority to act, and also a certificate that companies represented by them have authority to operate. Yearly statements of home companies must be made up to the 1st of January of the current year; foreign companies to the 1st of July of the preceding year. Companies from other States and of foreign countries must file with the commissioner a written stipulation that legal process affecting them may be served upon the commissioner, or a specified local agent. Any company doing business without authority, shall forfeit \$500.00 for each month of such unlawful business. No local tax by any city or county is allowed.

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### ITEMS.

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Hon. Ephraim B. Ewing, Judge of the Supreme Court of Missouri, died June 21st, after a brief illness.

Hon. R. C. Breckett has been appointed Chief Justice of the Supreme Court of Alabama, in place of Hon. E. Wolsey Peck, resigned.

Governor Woodson, of Missouri, has appointed Hon. W. B. Napton Judge of the Supreme Court of that State, to fill the vacancy caused by the death of Hon. E. B. Ewing.

Hon. Alfred M. Craig has been elected Judge of the Supreme Court of Illinois, in place of Chief Justice Lawrence, and Hon. John Scholfeld, in place of Hon. Anthony Thornton.

## CURRENT TOPICS.

—We have received transcripts of decisions in the following cases :

*Farmers' Mut. Fire Ins. Co. vs. Taylor.*  
—Supreme Court, Pa.

*Cammack vs. Lewis.*—U. S. Supreme Court.

*France and Wife vs. Aina Life Ins. Co.*—U. S. C. C., E. Dist. Pa.

*Payson, Assignee of Republic Fire Ins. Co. vs. Withers.*—U. S. C. C., Dist. Ind.

*The Imperial Fire Ins. Co. vs. Murray et al.*—Supreme Court, Pa.

—Hon. Gustavus W. Smith, insurance commissioner for the State of Kentucky, will accept our thanks for his annual report for 1872.

—We are under obligations to Hon. Lucien J. Barnes, insurance commissioner of Arkansas, for a copy of the insurance laws of that State.

—The Royal Humane Society, of London has a fire-escape corps for the protection of life. The corps has no official connection with the fire brigade of the city, although the two act in unison. They are provided with telescopic fire-escapes.

—Henry Plessner, of Indianapolis, having been found guilty of embezzling funds of the Republic Life Ins. Company, a new trial was granted him upon the ground, among other things, that as the company had been doing business in violation of law, there could be no embezzlement.

—At the recent commencement of the law department of Michigan State University, there were 123 graduates, two of whom were ladies.

—Hon. Thomas B. Butler, late Chief Justice of Connecticut, died at Norwalk on the 8th of June.

—It appears that Mr. J. Merritt has been induced to remain with the National Life, of Chicago, as General Superintendent of Agencies.

—Several of the South American States recently have expressed a desire to employ the coinage of the United States. In Ecuador American gold and silver are a common medium of exchange.

—Nashua, N. H., purchased two steam fire-engines, and then discovered that one of them would exhaust the entire water supply of the town in ten minutes.

—The London *Morning Post*, in an editorial on the report of a committee of the Society of Arts, to investigate the danger of a great fire in London, says :  
“ The committee entertains no doubt at all that were a serious fire to break out while a strong gale was blowing, the safety of London would be in the extreme peril. A ramble through the city will quickly convince any person who is inclined to dissent from this view, that the committee is right. From street to street he will pass between rows of lofty warehouses, filled to the very top with combustible articles of the most various kinds, and the lowest story of not a few of these fire-boxes he will find crammed with wood. It needs but a single spark, therefore, to set the whole ablaze. If there was a very strong wind, its fury would beat the flames against the next house and set it also on fire ; and then, unless the engines were on the spot before the blaze burst forth in the second house, human exertion could hardly hope to extinguish the fire. The overgrown volume of flame would be lashed with redoubled force against the neighboring houses, and at the same time sparks would be scattered in heaps all around by the wind. Very soon, therefore, instead of a single conflagration, the firemen would probably see them-



selves surrounded by several fires at once. When this happened, it is evident that there would be nothing for it but to sacrifice wealth of untold amount, and to proceed to blow up so much of the city as would make, between the burning and standing quarters, a chasm wide enough that even a storm could not drive the fire across. This is no fancy picture. It is what has actually happened in Chicago and Boston within a few years, and what may happen in any city anywhere that is not absolutely fire-proof. But how far from being fire-proof are London warehouses, with their many boarded floors, their thin roofs, thin lath and plaster partitions, and their enormous stores of inflammable materials, all the world is aware."

—E. R. Paul, Esq., has resigned the presidency of the Mutual Life of Chicago, and Stewart Marks, Esq., late secretary of the company, has been unanimously chosen to fill the vacancy. Mr. Paul has been an able and successful officer, and leaves with the good wishes of all connected with the company.

—Wells & Mason, general agents of the Charter Oak Life Insurance Co., of Chicago, have recently taken Mr. T. B. Merrill into the firm. Mr. Merrill was formerly general agent of the company for Iowa.

—The *London Review* says: "A singular marine insurance trial has recently been heard at Liverpool before Mr. Justice Archibald and a special jury, in which the plaintiffs, Messrs. Schofield & Co., shipowners, of Shields, sought to recover from Mr. H. Jones, an underwriter at Liverpool, the value of his subscription policy of insurance upon the steamer *Captain*, under the following circumstances: The plaintiffs on August 8th, 1871, effected an insurance upon her for twelve months for the sum of £23,000. At that time the vessel was

abroad. On the 9th of August, 1872, they renewed the policy for the increased amount of £25,000, Mr. Jones being one of the underwriters. During the night between the 8th and 9th August, 1872, the vessel struck upon a rock in Belle Isle Straits and was lost. The curious point now arose, whether the wreck actually occurred before or after midnight on the 8th of August, as if before, the first policy for the £23,000 would not have expired; and if after, it was contended that the loss would be covered by the new policy, and that the underwriters would be liable for the increased amount. According to the evidence it was shown that the ship struck after midnight, but on the part of the defendants it was argued that the liability must not be ruled by a calculation of English time, but by a calculation of the time at the spot where the disaster occurred. This, allowing for the difference of longitude, would fix the accident before midnight. The jury, however, taking the view that the calculation should be made upon the basis of English time, the contract to insure being made in England, gave a verdict for the plaintiffs. £25,000 was involved in this action."

—An important witness on examination, when questioned on the vital points of the case, answered each by saying that he had forgotten. The attorney conducting this examination, remarked that witness reminded him of an "incident" which he related thus: "I once heard a sermon on forgetfulness, in which the worthy minister announced his text thus: Abraham forgot Isaac; and Isaac forgot Jacob; and Jacob forgot Judas and his brethren. 'My brethren,' continued the minister, 'we must all see that people were as forgetful in ancient times as they are now.' Next witness will please come to the stand."

THE  
INSURANCE LAW JOURNAL.

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No. 9

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

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*From certified transcripts in our possession.*

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AGENT.

§ 138. LIFE.—*Authority of—Waiver of Forfeiture.*—The evidence showed that Selvage, after the death of the assured, bought the policy from the beneficiary upon the faith of representations made by defendant's agent that the amount of the insurance would be paid. *Held*, that if the agent was the agent of the defendant to receive the preliminary proofs, and having received them, knew that Selvage was negotiating with the beneficiary for the purchase of the policy, and by representing to him that the insurance would be paid, induced him to buy it, and if what passed between them was mutually understood and intended as a waiver of any such objections as have been made on this trial, the plaintiffs may recover, although the policy would otherwise have been void for the reasons stated in the objections.

*France et al. vs. Aetna Life Ins. Co.\**

*Rep'd Jour'l*, p. 657.

U. S. C. C., E. DIST. PENN.

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\* Decision rendered May 16th, 1873.

## APPLICATION.

§ 139. FIRE.—*Verbal—Representation.*—The printed portion of the policy, which was numbered “127,” contained the following provision: “Reference is had to assured’s application, No. 127, which is his warranty and a part hereof.” There was no written application, a verbal application only having been made in procuring the policy. *Held*, that the court below instructed the jury correctly that “the policy in this case is the whole contract between the parties, the application not being in writing, and is not a part of it, and is only a representation, and in order to invalidate the policy, must be shown to have embraced a statement of a fact material to the risk—to have been untrue and fraudulently made.”

*Newman vs. The Springfield F. and M. Ins. Co.\**

Rep’d Jour’l p. 682.

MINN. S. C.

## ASSIGNMENT.

§ 140. FIRE.—*Authority of Agent—Written Instructions to Agent.*—The policy required that immediate notice of any assignment should be given to the secretary of the company, and that the assignment should be indorsed upon the policy or otherwise acknowledged by him in writing. The assignment was written upon the policy, and immediately under the names of the subscribing witnesses the agents signed their names, “Stroud & Brown, for secretary,” and the same day reported the assignment to the company. The agents were accustomed to make such assignments and report them to the company. *Held*, that this was a proper assignment under the conditions of the policy. *Held*, also, that if the company outside of and beyond its special written authority “either expressly gives or encourages an agent to exercise great additional powers for several years, and ratifies and confirms the same, thus holding him out to the world as rightfully exercising all those powers, thereby inducing the public to believe in and to rely upon his said enlarged agency, the company cannot, after a loss has occurred, repudiate his action and fall back upon the written authority for the purpose of avoiding the

\* Decision rendered July Term, 1871.

legal effect of those acts which he has done by their encouragement in the general scope of the business."

*The Farmers' Mut. Fire Ins. Co. vs. Taylor.\**

Rep'd Jour'l p. 668.

PA. S. C.

## CONSTRUCTION.

§ 141. FIRE.—"*Builder's Risk*"—*Repairs*.—The appellant insured an ice-house belonging to the appellee. The following memorandum was printed on the back of the policy: "Builder's Risk."—"The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics, in building, altering or repairing the premises named in the policy, will vitiate the same unless permission for such work is indorsed in writing hereon." The president of the appellee testified that the ice-house was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition. *Held*, that "by a fair and reasonable interpretation of this article of the policy it cannot be understood as referring to the casual patching up of the building such as spoken of by the witness, but as prohibiting such hazardous use of the building as is generally denominated "*Builder's Risk*," which arises from placing it in the possession or under the control of workmen for rebuilding, alteration or repairs. *Held*, also, that "it is very obvious that a building so constructed would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business of the appellee that breakages should be repaired as they occurred, all of which was known to the appellants, and will be presumed to have been in their contemplation at the time the contract was made, and permitted by the written terms of the policy insuring the premises as an ice-house."

*Harper vs. The Albany Mutual Ins. Co.*, 17 N. Y., 194; *Washington Fire Ins. Co. vs. Davidson and Symington*, 30 Md., 92, 107, 108.

*Franklin Fire Ins. Co. vs. Chicago Ice Co.†*

Rep'd Jour'l p. 609.

Md. C. A.

\* Decision rendered May 17th, 1873.

† Decision rendered May 22nd, 1872.

§ 142. MARINE.—*Of Contracts—Avoidance of Policy—Kerosene—Exemplary Damages.*—The company insured the steamboat Berlin City. The policy provided that “if gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude or refined coal or earth oils, are kept or used on the premises without written consent, this policy shall be void.” Kerosene oil was used to light the cabin and saloon of the boat after the policy was issued, and it was claimed that this was in violation of the condition in the policy, and rendered the policy void. Damages beyond seven per cent. per annum on the judgment were also claimed as provided by statute, where the appeal is taken to harass and delay the plaintiff. *Held*, that “the contract should have a reasonable construction, reference being had to the circumstances under which it was made.” *Held*, also, that “if the language of the policy may be understood in more senses than one, it is to be interpreted in the sense in which the defendant—the insurance company—had reason to suppose the plaintiff understood it.” *Held*, also, that “even were it doubtful from the general tenor of the policy and the relation of the parties whether the term ‘refined coal or earth oils’ was used in the policy in an enlarged or restricted sense, other things being equal, the restricted construction should be adopted as being most favorable to the plaintiffs, who, in respect to the insurance company, stand in the position of promisees.” *Held*, also, “when the intent is doubtful, conditions providing for forfeitures (and such is the character of the condition of this policy) are to be construed strictly against those for whose benefit they were introduced. *Held*, also, that “the party to a contract who seeks to destroy its obligation by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture.” *Held*, also, that the use of kerosene was not in violation of the condition of the policy, and that the policy was not rendered void by its use, and, *Held*, also, that as it does not appear that the appeal was clearly frivolous, or that it was taken from sinister and improper motives, the damages claimed will not be awarded.

*Morse et al. vs. Buffalo F. and M. Ins. Co.\**

Rep'd Jour'l p. 622.

WM. S. C.

\* Decision rendered June Term, 1872.

§ 143. MARINE.—*Of Policy—Avoidance of Policy—Kerosene—Noscitur a sociis.*—The company issued a policy upon the steamboat Berlin City, which contained the following provision: "If gunpowder, camphene, spirit-gas, naphtha, benzine or benzole, chemical, crude or refined coal or earth oils are kept or used on the premises without written consent, this policy shall be void." Kerosene oil was used to light the cabin and saloon of the boat after the policy was used, and it was claimed that this was in violation of the condition in the policy, and rendered the policy void. The agent of the company testified that he did not understand, when the contract was made, that the use of kerosene was prohibited by the policy, and the circumstances of the case show conclusively that the plaintiffs understood the policy as did the agent. *Held*, that the policy expressly enumerates those highly inflammable articles which are more commonly used, and then, "to protect the insurance company from the danger of loss by reason of the keeping or use of other articles of like character and equally dangerous, it specifies in general terms as included in the prohibition, 'chemical, crude or refined coal or earth oils.' Hence any article of like character and equally dangerous as those enumerated, although such article is not specifically named in the policy, is within the prohibition. Further than this we do not think the scope of those general terms in the policy should be extended. In other words, we think that the maxim *noscitur a sociis* is applicable here, and that the term 'refined coal or earth oils,' as used in the policy, should be construed to mean only those articles or substances which are included in such general description, and which are also as highly inflammable, and therefore as dangerous to the insured property as naphtha, benzine or benzole."

Broom's Legal Maxims, 451.

*Held*, also, that the fact that neither the agent of the company nor the insured at the time the insurance was effected understood that the use of kerosene on the boat for illuminating purposes was prohibited, supports that construction of the contract which does not make the prohibition in the policy apply to the use of kerosene.

*Morse et al. vs. Buffalo F. and M. Ins. Co.*

## DESCRIPTION.

§ 144. *LIFE.—Of Property—Misrepresentation—Application.*—The policy sued on was procured by an insurance broker, who solicited the plaintiff to insure the building, and who, without his knowledge, prepared an application, which he presented to an insurance agent, who acted for several companies, and was authorized to receive and transmit applications and deliver policies for the defendants. The broker informed the agent that the building was used as an organ and melodeon factory, and that he believed a small part of it was to be used as a machine shop. The agent, however, in answer to a question in the application as to what was manufactured in the building, wrote "machinery." The broker received the policy from the agent, to whom it had been forwarded by the company, and delivered it to the plaintiff, who did not know of the application or that the broker had taken any steps to procure the insurance. The plaintiff received the policy without objecting to its form or contents. The policy purported to insure the plaintiff "on his frame two-story building, occupied as a machine shop," and contained a provision that "the application for the insurance is a part of the contract," and that "whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act or with the knowledge or consent of the insured, without the consent of the company first obtained in writing, this policy shall be void." The building at the date of the policy and up to the time of the fire was occupied as a manufactory of organs and melodeons, upon which it was agreed the risk was greater than upon a machine shop. *Held*, that the representation was material, and that "it makes no difference that the misrepresentation was accidental, unintentional, and without any fraudulent intent, or even that the party insured was ignorant that such a representation had been made. In either case the ground of the objection is the same," and that "the misrepresentation takes away the foundation of the policy, and as it was the affirmation of a fact as then existing, it is enough to prevent the policy from taking effect as a contract.

The minds of the parties have not met upon the organ factory as the subject-matter of the insurance."

*Kimball vs. Aetna Ins. Co.*, 9 Allen, 540 ; *Sillem vs. Thornton*, 3 El. & Bl. (Am. ed.), 868, 869, note ; *Carpenter vs. American Ins. Co.*, 1 Story, 57 ; *Campbell vs. New England Ins. Co.*, 98 Mass., 381 ; *Wilbur vs. Bowditch Ins. Co.*, 10 Cush., 446.

*Held*, also, that "the plaintiff sues upon the policy, and the court cannot alter the contract as therein expressed."

*Tibbetts vs. Hamilton Ins. Co.*, 8 Allen, 569.

*Held*, also, that "however unfortunate this may be for the plaintiff, he accepted the policy in its present shape, and cannot well complain that he has been misled by it."

*Barrett vs. Union Ins. Co.*, 7 Cush., 175.

And that "in this view of the case the application becomes unimportant, as does also the question whether Gleason (the broker) was the plaintiff's or the defendants' agent." It is decisive of the case that the policy "cannot be applied to the building which was destroyed by fire."

*Goddard vs. Monitor Mutual Fire Ins. Co.\**

Rep'd Jour'l p. 668.

MASS. S. J. C.

### INSURABLE INTEREST.

§ 145. **FIRE.**—*Evidence of Title.*—The appellee obtained a policy of insurance upon an ice-honse. The proof in an action on the policy was that the appellee was in possession of the property, claiming and occupying it as its owner. *Held*, that "this is *prima facie* evidence of title. 'A person in the possession of land is *prima facie* presumed to be seized in fee.'"

1 Phillips on Evidence, 646 and note.

"In the absence of proof of an outstanding title in others, or any incumbrance upon the property, this *prima facie* presumption of a seizin in fee, growing out of the occupation by the appellee as owner of the property, was sufficient to show an insurable interest therein."

*Franklin Fire Ins. Co. vs. Chicago Ice Co.*

—§ 141.

\* Decision rendered October Term, 1871.



§ 146. *LIFE.—Brother and Sister.*—The defendant issued two policies upon the life of the deceased for the benefit of his sister, one of the plaintiffs, who paid the premiums. At the time the policies were issued, and afterward until the death of the assured, the sister was a married woman, and in no respect dependent upon her brother, nor was he in any way indebted to her. *Held*, that if the deceased at the time of the insurance was unmarried and without issue or parent living, the insurance for the sister was valid if the risk insured was properly described in the policy.

*France et al. vs. Aetna Life Ins. Co.*

—§ 128.

§ 147. *FIRE.—Construction of Policy.*—The policies issued by the companies were upon property including engines, boilers, machinery and improvements held by the defendants in error as lessees, who had assumed an obligation to return and redeliver the property in good order and condition, on the expiration of the lease. The policies contained the provision, "This insurance to cover their working interest in the above insured property." *Held*, that the lessees' interest in the property was not measured by the value of the use thereof from the time of the loss until the expiration of their term, but that their insurable interest was to the extent of the value of the property which they were bound to replace. *Held*, also, that the language of the policy was sufficiently comprehensive to cover the entire insurable interest which the assured had in the policy.

*The Imperial Fire Ins. Co. vs. Murray et al.\**

Rep'd Jour'l p. 676.

P. S. G.

#### MISREPRESENTATION.

§ 148. *FIRE.—Verbal Representation.*—The policy was issued on a verbal application. At the trial, in a suit upon the policy, the court instructed the jury that "where a contract of insurance is entered into upon a verbal representation, which is false, it must be shown to have been material and fraudulently made,

\* Decision rendered May 17th, 1873.

so that if not true, the contract would not have been entered into; but if the representation be substantially true, or the party has not been prejudiced or deceived by it, the law will hold the policy good." *Held*, that "the instruction states nothing but a correct general rule of the law of fire insurance."

2 Parsons on Contracts, Book 3, Ch. XIV., Fire Ins. D.

*Newman vs. The Springfield F. and M. Ins. Co.*

—4 120.

### PLEADING.

§ 149. FIRE.—*And Proof—Performance of Conditions.*—The defendant, on trial, under the defense that the roof was defective, claimed the right to show the condition of the whole building, on the ground that the complaint alleged performance of all the conditions of the policy, one of which was that if the risk should be increased by any means whatever within the control of the assured, the insurance should be void. *Held*, that the assured "is not to plead and prove affirmatively that the risk has not been thus increased. If it has been, it is matter of defense. The defendant is therefore confined to the proof of what it has alleged in this behalf."

*Newman vs. The Springfield F. and M. Ins. Co.*

—4 120.

### POLICY.

§ 150. FIRE.—*Assignment of—Assignee's Interest—Notice of Assignee's Interest—Proofs of Loss, by whom made.*—The policy, issued to Stanchfield, provided that it should not be assignable without defendant's consent. After the making of the policy, the agent of the defendant, at Stanchfield's request, made the following indorsement upon the policy, "Payable, in case of loss, to George Newman, to the extent of his claim. Minneapolis, February 1st, 1870. E. P. Pierce, agent." After the loss Newman brought suit against the company. *Held*, that "this was a mutual agreement between the parties that the policy should be thus payable thereafter, and the policy thereafter had the same force and effect as if Samuel Stanchfield had been thereby in

the first instance, in terms, insured against such loss on the property in question, payable, in case of loss, to said Newman to the extent of whatever claim he then had on said premises." *Held*, also, that it was unnecessary "for plaintiff to notify defendant of his claim at the time of the loss or before action brought, as it would have been for Stanchfield to have notified it that he still owned the property," and that "the amount he could recover would depend on the amount of his claim at the time of the fire, but by no means on defendant's knowledge in that regard." *Held*, also, that "Stanchfield, and not plaintiff, was the proper person to make the proofs."

*Newman vs. The Springfield F. and M. Ins. Co.*

—§ 139.

§ 151. FIRE.—*Construction of—Application—Verbal Statement.*—The policy, numbered "127," which contained the following provision: "Reference is had to assured's application, No. 127, which is his warranty and a part hereof," contained the following clause: "Applications for insurance must specify the construction and materials of the building to be insured. \* \* \* If any person insuring any \* \* \* building in this office shall make any misrepresentation or concealment, such insurance shall be void." There was no written application, a verbal application only having been made in procuring the insurance. *Held*, that "this clause of the policy contemplates statements in such a written application as thereinbefore described," and not such as the assured made in his various interviews with the agent.

*Newman vs. The Springfield F. and M. Ins. Co.*

—§ 139.

## PRACTICE.

§ 152. FIRE.—*Order of Evidence.*—On trial, in a suit upon a policy, evidence of the acts of company's agent was given before evidence of his authority, the evidence of his authority being afterward given during the course of the trial. *Held*, that this was no ground for disturbing the verdict.

*Newman vs. The Springfield F. and M. Ins. Co.*

—§ 139.

## PRIOR INSURANCE.

§ 153. FIRE.—*Notice of—Authority of Agent.*—The defendant in error applied to the agents of the plaintiff, who were also agents of another company, and who were authorized to take applications and make contracts, for an insurance of \$4,000.00. The agents wrote to the secretary that if the company did not wish to take the full amount, they would place \$1,000.00 in the other company, and received answer that the company would take only \$3,000.00. They accordingly issued the policy sued on for that amount, and at the same time a policy in the other company for \$1,000.00. The policy sued on contained a provision that it should be void in case there was prior insurance on the property, unless the company should have received notice and indorsed it upon the policy. The other insurance was not mentioned in this policy at the time it was issued, but subsequently, and prior to the loss, the agents indorsed it upon the policy and informed the company of the indorsement. *Held*, that the company had actual notice of the insurance at the time the policy was issued, and that if it was dissatisfied with the acts of its agents it should have indicated it and repudiated the policy at the time.

*The Farmers' Mut. Fire Ins. Co. vs. Taylor.*

—§ 140.

## PROOFS OF LOSS.

§ 154. FIRE.—*Certificate of Magistrate—Waiver—Indorsement on Policy.*—The appellant issued a policy upon an ice-house belonging to the appellee. The policy provided that persons sustaining loss or damage should forthwith give notice thereof and should also furnish proofs of loss, including a certificate from a magistrate, notary public or commissioner of deeds, stating that he had examined the circumstances attending the fire, loss, or damage; that he was acquainted with the assured, and that he believed that he had sustained loss and damage to the amount certified. The last clause of the eighth condition of the policy was as follows: "Nothing but a distinct specific agreement clearly expressed and indorsed on this policy shall operate as a waiver of any prohibited or written condition, warranty or re-

striction therein." After the fire the agent of the appellee made out proofs of loss and delivered them to the appellant's agent, but from ignorance and inexperience failed to procure and deliver the certificate of the magistrate or notary. The appellee stated in its first prayer that it furnished the appellant's agent preliminary proofs of loss, which were forwarded by the agent to the appellant, and that the appellant made no objection to them or to the absence of the certificate, and that afterward the president of the appellant refused to pay the loss on other grounds than the defects in the proofs of loss or the absence of said certificate. *Held*, that "apart from the terms contained in the last clause of the eighth condition of the policy, there can be no doubt that the facts stated in the appellee's first prayer, if believed by the jury, would amount to a waiver of the defects in the preliminary proofs, and preclude the appellant from objecting to their sufficiency."

*Allegre vs. Ins. Co.*, 6 H. & J., 412, 413; *Edwards vs. The Baltimore Fire Ins. Co.*, 3 Gill, 186; *Franklin Fire Ins. Co. vs. Coates & Glenn*, 14 Md., 294, 295; *Taylor vs. Merchants' Fire Ins. Co.*, 9 Howard, 403, 404.

*Held*, also, that "according to our construction of the last clause in the eighth condition of the policy, it refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated as *conditions*, and that has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing proofs of loss. These are not conditions inherent in the contract itself, but stipulations to be performed by the assured as preliminary to his right of action on the contract or to the liability of the company to pay the loss."

*Blake vs. Exchange Mutual Ins. Co.*, 12 Gray, 625.

*Franklin Fire Ins. Co. vs. Chicago Ice Co.*

—§ 141.

§ 155. FIRE.—*Waiver of—Notice of Loss—Adjuster—Jury.*—The evidence showed that the assignee of the insured gave notice of the loss to the agents of the company, who by the next mail informed the company by a letter addressed to the secretary. In response to the notice the adjuster of the company called upon

the assignee and told him that he saw no reason why the loss should not be paid, and that he would see the insured and get the proofs of loss from him. The agents of the company afterward informed him that the proofs had been obtained, and were satisfactory, and that the loss would be paid. *Held*, that the notice was a sufficient notice to the company.

*West Branch Ins. Co. vs. Helfenstein*, 4 Wr., 290.

*Held*, also, that the evidence justified the jury in finding that if the proofs had not been made, the company waived them, and that the non-production of the written proofs of loss of the plaintiff below was not fatal to his cause of action.

*Shaw vs. Turnpike Co.*, 2 P. R., 454; *Lycoming Ins. Co. vs. Schuffler*, 6 Wright, 188.

*Held*, also that "a particular statement of the loss may be waived by the company, and if there be any evidence from which such a waiver may be inferred, it is for the jury."

*Franklin Fire Ins. Co. vs. Updegraff et al.*, 7 Wright, 350; *Buckley vs. Garrett*, 11 Wright, 205 and cases cited.

*The Farmers' Mut. Fire Ins. Co. vs. Taylor*.

—§ 140.

## REPRESENTATION.

§ 156. *LIFE.—Disease—Age.*—The policies issued by the defendant upon the life of the deceased each contained a clause providing that the proposal, answers and declaration in the application should be a part of the policy, and that if they were false or fraudulent the policy should be void. In answer to a question in the application as to whether he had ever had any of certain specified diseases, among which was rupture, the defendant answered "None," and in answer to another question in the application he stated that his age was thirty-five. *Held*, that the clause in the policies made the answers to the questions part of the contracts, and that they thus had the effect of warranties, and that if they were wholly or in any material respect false or fraudulent, the plaintiffs could not recover, and that by the expression "in any material respect," the court must be understood as meaning in any respect or degree material to the risk insured, whether as to

age, or health, or otherwise howsoever. *Held*, also, that if the deceased was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured, or if at that time or within such period he wore a truss in order that it might repress hernial extrusion, the verdict should be for the defendant. *Held*, also, that if the answers to the questions were materially untrue as to the age of the applicant, the policies are void, and that if he was thirty-seven or even thirty-five years old the difference was not immaterial.

*France et al. vs. Aetna Life Ins. Co.*

—§ 128.

#### TITLE.

§ 157. FIRE.—*Mortgage—Incumbrance—Tax-deed.*—The assured, in applying for the policy, stated that there was no incumbrance on the property except a mortgage. Prior to the said mortgage the mortgagee had, at the request of the assured, paid taxes on the property, and the amount so paid was included in the debt secured by the mortgage. Upon paying the taxes the mortgagee had taken a tax-deed of the property on sale thereof for delinquent taxes. The existence of this deed was not known to the assured until after the loss. *Held*, that the mortgagee could not affect the mortgagor's title by taking the deed, and that whether the tax-title was good or bad in law, in equity he would be the mortgagor's trustee; that the assured, whether he knew of the tax-deed or not, only stated the truth in saying that the property was his; and that the tax-deed, if recorded, would be a cloud on his title, but could not make him less the owner, nor is it an incumbrance.

*Newman vs. The Springfield F. and M. Ins. Co.*

—§ 129.

# REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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SUPREME COURT OF WISCONSIN,

JUNE TERM, 1872.

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*Appeal from the Circuit Court of Winnebago County.*

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MORSE AND OTHERS, *Appellees*,

vs.

BUFFALO FIRE AND MARINE INS. CO., *Appellant*.\* }

[Concluded from August Number, p. 626.]

4. The contract should have a reasonable construction, reference being had to the circumstances under which it was made. These have already been mentioned and need not be repeated; were we to hold that the use of kerosene is prohibited by this policy, could it not be successfully claimed on the same principle that the use of matches on the boat, which are prepared with a detonating substance composed largely of phosphorus, or the use of paints or varnish thereon, one of the component parts of which happens to be benzine or some other form of "crude or refined coal or earth oils," is also prohibited, and that the use of either would vitiate the policy? Such a construction of the language of the policy would clearly be unreason-

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\* Decision rendered June Term, 1872.



able, but no more so in our opinion than the construction contended for by the learned and ingenious counsel for the defendant.

5. When the intent is doubtful, conditions providing for forfeitures (and such is the character of the condition of this policy) are to be construed strictly against those for whose benefit they were introduced.

6. The party to a contract who seeks to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture.

"The terms of the contract must be clear and explicit in his favor." *Clinton vs. The Hope Insurance Company*, 45 N. Y., 454.

A discussion of these principles and references to numerous cases sustaining them will be found in the opinion of the court by Mr. Justice Porter in *Hoffman vs. The Aetna Insurance Co.*, 32 N. Y., 405.

The foregoing considerations impel us to the conclusion that the judgment of the Circuit Court should be affirmed.

The counsel for the plaintiffs asks this court to exercise a power vested in it by statute to award damages against the defendant beyond the seven per cent. per annum on the judgment which the law gives in all cases. *Taylor's Statutes*, 1,646, § 47; this request is made upon the alleged grounds that the appeal was taken solely to harass and delay the plaintiffs.

If the appeal is clearly frivolous, and was taken from sinister and improper motives, the request should be granted, for this power was given to the court to be used in proper cases to discourage appeals of the character just mentioned. But we are not prepared to say that such is the character of this appeal. It presented for the determination of this court a question of great importance both to insurers and insured, and it was very desirable that such question be definitely settled, so that parties to similar contracts in this State at least might know their rights and obligations in relation thereto. The determination of that question has cost us too much thought and investigation to permit us to say that the appeal ought not to have been taken. In the absence of any satisfactory evidence to the contrary, we choose to believe that the appeal was taken to obtain a decision of this court upon the important question involved in the action, and not for the mere purpose of harassing the plaintiffs and delaying them in the collection of their just claim against the defendant.

*By the Court.*—Judgment affirmed.

## UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF PENNSYLVANIA.

FRANCE AND WIFE, *Plaintiffs*,

vs.

ÆTNA LIFE INS. CO., OF HARTFORD, *Defendant*.\*FRANCE AND WIFE, TO USE OF SELVAGE, *Plaintiffs*,

vs.

THE SAME.\*

The defendant issued two policies upon the life of the deceased for the benefit of his sister, one of the plaintiffs, who paid the premiums. At the time the policies were issued, and afterward, until the death of the assured, the sister was a married woman and in no respect dependent upon her brother, nor was he in any way indebted to her.

*Held*, that if the deceased at the time of the insurance was unmarried and without issue or parent living, the insurance for the benefit of his sister was valid if the risk insured was properly described in the policies.

The policies each contained a clause providing that the proposal, answers and declaration in the application should be a part of the policy, and that if they were false or fraudulent the policy should be void.

*Held*, that the clause in the policies made the answers to the questions part of the contracts, and that they thus had the effect of warranties, and that if they were wholly or in any material respect false or fraudulent, the plaintiffs could not recover, and that by the expression "in any material respect," the court must be understood as meaning in any respect or degree material to the risk insured, whether as to age or health or otherwise, howsoever.

The deceased, in answer to a question in the application as to whether he had ever had any of certain specified diseases, among which was rupture, answered—"None."

*Held*, that if he was ruptured at the time, or at any such previous period, that the rupture may have been material to any question of the soundness of his health when his life was insured, or if at that time or within such period he wore a truss in order that it might repress hernial extrusion, the verdict should be for the defendant.

\* Decision rendered May 16th, 1873. Reported for the *Insurance Reporter*.

The deceased, in answer to questions in his applications, stated that his age was thirty years.

*Held*, that if the answers to the questions were materially untrue as to the age of the applicant, the policies are void, and that if he was thirty-seven or even thirty-five years old, the difference was not immaterial.

*Held*, that if the policy had been assigned by the beneficiary to Selvage, before the death of the assured, as security for a loan, the defendants could not be estopped from denying their liability as to the amount of the loan by anything alleged to have occurred after the death of the assured.

If the agent was the agent of the defendant to receive the preliminary proofs, and having received them, knew that Selvage was negotiating with the beneficiary for the purchase of the policy, and by representing to him that the insurance would be paid, induced him to buy it, and if what passed between them was mutually understood and intended as a waiver of any such objections as have been made on this trial, the plaintiffs may recover, although the policy would otherwise have been void for the reasons stated in the objections. Verdict in first case for defendant, in second for plaintiffs.

NATHAN SHARPLESS, *for Plaintiffs.*

CHRISTIAN KNEASS AND SAMUEL C. PERKINS, *for Defendant.*

CADWALADER, J.

These were separate actions tried together by consent, on two policies of insurance, each for \$10,000.00, made by defendants on the life of Andrew J. Chew for the benefit of his sister, Mrs. Lucetta T. France. The application and the policy issued thereon in the first of above cases were dated September 13th, 1865, and in the second case, July 12th, 1865. The applications and policies were alike in both cases, and the defenses, so far as regarded the questions affecting the force and effect of the contracts themselves, were the same.

There was a special and distinct question in Selvage's case arising out of his position as assignee, or alleged purchaser, for a valuable consideration, of the policy sued on to his use.

There were three grounds of defense mainly insisted upon :

*First.*—Want of interest on the part of the plaintiff in the life insured.

*Second.*—Misrepresentation and concealment of the fact that the party insured had been ruptured, and actually was so at the time the applications were made.

*Third.*—Misdescription of the age of the party insured, making him seven years younger than he really was.

The premiums on both policies were regularly paid up to the time of the death. On the policy assigned to Selvage they were all cash ; on the other, one half note. The money was paid and the notes executed for the premiums by Mrs. France.

As to the want of interest, it appeared that Mrs. France, at the time the policies were issued, and up to the time of trial, was a married woman, and in no respect dependent on her brother whose life was insured ; nor was there any evidence of any indebtedness on his part to her, either prior or subsequent to the applications for insurance.

The defendants requested the judge to charge—

“That if the applications and policies were in fact made and taken out by Mrs. France for her own benefit, she must show an insurable interest in the life of Chew ; and if she was a married woman and in no way dependent on him for support, the mere fact that she was his sister did not give her such insurable interest ; and that if Chew, *at the time* the applications were made and policies issued, was not indebted to her, then she had no insurable interest as a creditor in his life.”

The judge declined to charge as requested, but charged as follows:

If Chew at the time of the insurance was unmarried and without issue or parent living, the insurance for the benefit of his sister was valid *if the risk insured was properly described in the policies*. As men of business you will see the importance of this last remark. There are persons who may be described as presumptively next of kin, and who can insure the lives of their relatives ; or if any lives may be insured by any persons it is of course of paramount and indispensable importance that the risk be correctly described.

The policies each contained a clause making the proposal, answers and declaration in the application part of the policies, and with a condition that if false or fraudulent, the policies should be void ; and the judge instructed the jury that this clause made the answers to the questions part of the contracts, and they had thus the effect of warranties, and if they were wholly or in any material respect false or fraudulent, the plaintiffs could not recover. The words “in any material respect,” he said, must be understood as meaning *in any respect or degree material to the risk insured*, whether as to age, or health, or otherwise howsoever.

In answer to a question whether the insured had ever had any of certain specified diseases, among them “rupture,” and if so, how long and to what extent, the insured stated in the applications, “None.”

The defendants alleged that he had been ruptured, and was ruptured at the time of the insurances, and much evidence was given on this point, as to which the judge gave the following instruction :

If the jury believe that Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured ; or if at that time or within such prior period he wore a truss in order that it might repress hernial extrusion, the verdict should in either case be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet if the jury find that from 1855 or thereabouts until after the last insurance, in 1865, he had no such disease, and was all this interval in the habit of working and using bodily exercise, and occasionally dancing, bathing and traveling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit ; that his health was not impaired or affected by the former rupture ; that it would not if mentioned have increased the risk or the premium, and that there was in this respect no falsehood or willful suppression, I cannot give the instruction absolutely that the answer "none" to the question was untrue and false.

I have doubts whether I have not charged too favorably for the plaintiffs on this point.

My chief difficulty is that the next question is, whether the party is subject to "habitual" diseases mentioned in the same, as if there were a distinction between "habitual" and ever having had them.

Upon the third ground of defense, the defendants requested the court to instruct the jury—

"That if the answers in the applications to questions four and five, as to date of birth and age next birthday of Chew were false or untrue, the policies are void, and the verdict must be for the defendants."

The judge instructed the jury as follows :

If you believe that the answers to these questions were materially untrue as to the age of Chew, the policies are void and the verdict must be for the defendants ; and if he was thirty-seven or even thirty-five years old, the difference was not immaterial. I give the instruction as requested.

There are two distinct questions in the application. "4. Place and date of birth of the party whose life is to be insured. 5. Age next birthday." A good deal has been said about the uncertainty this man was under as to his age. I cannot say that was any reason he should be careless in describing his age, but, on the contrary, he

ought to have been the more careful. I agree that if he had described his age as uncertain, the defendants must have abided by the contract as made. But this is not the contract; he is not described as a person of uncertain age. As to the insurance of July his answer to question five is simply "Thirty years," and his answer to question four, "Born in 1835, Gloucester County, New Jersey," and there is interlined between "1835" and "Gloucester County, New Jersey," the words "October 28th."

Mr. Scott, the agent who took the application, has explained how that occurred. He says Chew said it was as near as he could recollect, and although he states there was no doubt at all about the year, he says there was a difficulty in determining the day of the month. Now, though this application does not contain the words "as near as I can recollect," I think, under the circumstances of the case, you are at liberty to read it as if they were there. I don't think it makes any material difference whether they are there or not.

As to the second application, the one in September, the answer to question four is, "Born New Jersey, 1835." The fifth question is, "What is your age next birthday?" and the answer, "Thirty years October 28th, as near as I can recollect." That certainly does not mean to apply to the thirty years; it means, according to fair reading, that he was born in 1835. It was the 28th *October* as near as he can recollect. He signs at the foot of this application, "That is as near as I can remember," applying to all the preceding questions. It is not a question of words, but of fair meaning. If the man was a few months or even perhaps a year or two older than he states, it might not materially affect the risk; and even without the words "as near as I can recollect" or "remember," if the difference was a slight discrepancy, such as would not affect the risk, I should not think it a material difference, and certainly not when these words are contained in the application. But these words have not any indefinite meaning; they don't mean, I am a person of uncertain age, but am a person of the age of thirty years or thereabouts, which in law means not materially different from that age.

The judge then reviewed and commented on the evidence respecting the age of the party insured, and added:

I do not see how you can decide this case upon the evidence, disregarding the fact that Chew was at least 35 or 37 years of age. If so, the risk was materially misdescribed in these policies, and the plaintiffs cannot recover except as to one of them, and that upon a special ground.

the insurance is a part of the contract," and that "whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act or with the knowledge or consent of the insured, without the consent of the company first obtained in writing, this policy shall be void."

The building, at the date of the policy and up to the time of the fire, was occupied as a manufactory of organs and melodeons, upon which it was agreed the risk was greater than upon a machine shop.

The policy was procured by an insurance broker, who had solicited the plaintiff to insure the building, and who without his knowledge prepared an application which he presented to an insurance agent, who acted for several companies and was authorized to receive and transmit applications and deliver policies for the defendants. The broker informed the agent that the building was used as an organ and melodeon factory, and that he believed a small part of it was to be used as a machine shop. The agent, however, in answer to a question in the application as to what was manufactured in the building, wrote "machinery."

The broker received the policy from the agent to whom it had been forwarded by the company, and delivered it to the plaintiff, who did not know of the application, or that the broker had taken any steps to procure the insurance. The plaintiff received the policy without objecting to its form or contents.

*Held*, that the representation was material, and that it makes no difference that the misrepresentation was accidental, unintentional, or without fraudulent intent, or that the party insured was ignorant of the fact that such a representation had been made, as in either case the ground of objection is the same: the insurers were misled.

*Held*, that the defendants never insured the plaintiff's organ factory, and that the minds of the parties never met upon it as the subject-matter of insurance.

*Held*, that the court cannot alter the contract as expressed in the policy, and that as the plaintiff accepted the policy in its present shape, he cannot complain that he has been misled by it, and that in this view of the case the application becomes unimportant, as does also the question whether the broker was the plaintiff's or the defendants' agent.

*Held*, that it is decisive of the case that the policy which the plaintiff received without objection cannot be applied to the building destroyed. Judgment for the defendants.

The policy was issued by the defendants under date of October 1st, 1869, and insured the plaintiff in the sum of \$2,500.00, for one year from date, against loss or damage by fire, "on his frame two-story building, occupied as a machine shop and situated" in Worcester. The policy was expressed upon its face to be made and accepted upon the following express conditions, viz: "That the application for the insurance is a part of the contract;" "that if the risk shall be increased by any means whatever within the control of the assured, this policy shall be void;" and "that whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act or with the knowledge or consent of the insured, without the consent of the company first obtained in writing, this policy shall be void."

The case was submitted to the judgment of the court on a state-

ment of facts, in which it was agreed that the building was destroyed by fire on March 22nd, 1870, and that due notice of the loss was given to the defendants ; but that at the date of the policy and up to the time of the fire it was occupied as a manufactory of organs and melodeons ; that wood-shavings were made on the premises ; that "the risk of the destruction by fire of an organ and melodeon factory is greater than that of a machine shop ;" and that the building was so occupied with the knowledge and consent of the plaintiff, and without the defendants' knowledge or consent, unless it was to be inferred from the following facts :

David Gleason, an insurance broker, solicited the plaintiff to insure the building, and the plaintiff replied that he would not unless he could procure insurance thereon within a certain rate of premium. Gleason afterward prepared an application to the defendants, in the plaintiff's name, for insurance on the applicant's "frame two-story building" in Worcester, which contained a schedule of questions, and among them the following : "Question 4." "What is manufactured, and of what material? Are wood-shavings made on the premises?" This application Gleason took to George J. Mowry, an insurance agent in Worcester, who filled up certain blanks in it, without making any personal examination of the building, from information furnished by Gleason, who had examined it. Among the blanks filled by Mowry, was the date, "October 1st, 1869 ;" the amount of insurance applied for, "\$2,500.00," and the answer to Question 4, "Machinery." Before writing in this answer, Mowry asked Gleason what was done in the building, and Gleason replied that it was used as an organ and melodeon factory, but he believed that a small part of it was to be sometime used for a machine shop. Gleason then signed the application as follows : "Dorrance S. Goddard, applicant, by David Gleason ;" and Mowry wrote his own name upon the back of it and forwarded it by mail to the defendants, who wrote the policy and sent it by mail to Mowry, without having any other information about the property than what was furnished by the application. Mowry gave the policy to Gleason, who delivered it to the plaintiff and received from the plaintiff the stipulated premium of \$50.00, out of which he paid \$45.00 to Mowry, and Mowry paid \$42.50 to the defendants.

The plaintiff did not see the application, gave no information from which it was filled up, and did not know of its existence, except from the reference to it in the policy, until since the commencement of this action. And the first knowledge he had of the insurance was when



Gleason brought the policy to him and he paid the premium. On March 8th, 1870, the plaintiff procured of the defendants, at their office in Boston, an indorsement upon the back of the policy, making it payable, in case of loss, to the Worcester County Institution for Savings, from which he had obtained a loan on the property. He did not at that time disclose to the defendants the purposes for which the building was used, nor was there any circumstance calling or directing the attention of either party to that subject.

Gleason was accustomed to solicit applications for insurance from persons owning buildings, and to procure, either directly from the insurance companies, or through the intervention of agents, policies of insurance ; and for so doing he received a certain amount of the premium paid by the insured to the company, as a commission for his services. He did not solicit in behalf of any particular company, but effected insurance in such companies as he saw fit, unless the party to be insured indicated a preference. He had no account with the defendants, his name not being on their books at all, and had never written to or received any letters from them.

Mowry acted as an insurance agent for several companies, and was authorized by the defendants to receive and transmit applications for insurance to them. He had no power to issue or countersign policies, and did not do so ; but the policies were issued at the office of the defendants, in Boston, and were sent to him by mail, and by him delivered to the persons insured or those from whom he received the application. The premiums paid by the insured were forwarded by Mowry to the company, his commissions being first deducted. And this was the extent of his authority.

P. E. ALDRICH, *for Plaintiff.*

W. G. COLBURN, (C. ALLEN with him,) *for Defendants.*

AMES, J.

It is a fatal defect in the plaintiff's case that the policy professes to insure a machine shop, and that the building destroyed by fire was not a machine shop. It would be doing great violence to language to contend that a building in which organs and melodeons are manufactured can be correctly described as a machine shop. It appears by the report of the case, that the risk of destruction by fire is greater in the case of a building in which organs and melodeons are manufactured, than in that of one in which machinery is manufactured. The representation therefore was material, and it was untrue. It

makes no difference that the misrepresentation was accidental, unintentional, and without any fraudulent intent, or even that the party insured was ignorant that such a representation had been made. In either case, the ground of objection is the same. The insurers were misled. They were willing to insure a machine shop, and supposed they were so doing ; but they had never insured the plaintiff's organ factory, which was a different and more hazardous risk. The misrepresentation takes away the foundation of the policy, and, as it was an affirmation of a fact as then existing, it is enough to prevent the policy from taking effect as a contract. The minds of the parties have not met upon the organ factory as the subject-matter of insurance. *Kimball vs. Aetna Insurance Co.*, 9 Allen, 540 ; *Sillem vs. Thornton*, 3 El. & Bl. (Am. ed.), 868, 889 note ; *Carpenter vs. American Insurance Co.*, 1 Story, 57 ; *Campbell vs. New England Insurance Co.*, 98 Mass., 381 ; *Wilbur vs. Bowditch Insurance Co.*, 10 Cush., 446. The plaintiff sues upon the policy, and the court cannot alter the contract as therein expressed. *Tibbetts vs. Hamilton Insurance Co.*, 3 Allen, 569. However unfortunate this may be for the plaintiff, he accepted the policy in its present shape, and cannot well complain that he has been misled by it. *Barrett vs. Union Insurance Co.*, 7 Cush., 175.

In this view of the case the application becomes unimportant, as does also the question whether Gleason was the plaintiff's or the defendants' agent. It is decisive of the case that the policy which the plaintiff accepted without objection, or attempt to have any mistake corrected, cannot be applied to the building which was destroyed by fire.

**Judgment for the defendants.**

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Common Pleas of Susquehanna County.*

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THE FARMERS' MUTUAL FIRE INS. CO., Plaintiff  
in Error,

vs.

TAYLOR Defendant in Error.\*

The policy contained a provision that it should be void in case there was prior insurance, unless the company should have received notice thereof and indorsed the assignment upon the policy. The defendant in error applied to the agents of the plaintiff, who were also agents of another company, and who were authorized to take applications and make contracts, for an insurance of \$1,000.00. The agents wrote to the secretary that if the company did not wish to take the full amount they would place \$1,000.00 in the other company, and received answer that the company would take only \$3,000.00. They accordingly issued a policy for that amount, and at the same time another policy in the other company for \$1,000.00. The other insurance was not mentioned in the policy at the time it was issued, but afterward, and before the loss, the agents indorsed it upon the policy and informed the company of it.

*Held*, that the company had actual notice of the additional insurance at the time the policy was issued, and that if it was dissatisfied with the acts of its agents it should have indicated it and repudiated the policy at the time.

The policy required that immediate notice of any assignment should be given to the secretary, and that it should be indorsed upon the policy or otherwise acknowledged by him in writing. The assignment was written upon the policy, and under it the agents of the company signed their names, "Stroud & Brown, for secretary." The agents were accustomed to make such assignments and report them to the company. *Held*, that this was a proper assignment under the conditions of the policy.

The assignee of the insured gave notice of the loss to the agents of the company, who by the next mail informed the company, by a letter addressed to the secretary. *Held*, that the notice was sufficient.

The adjuster of the company called upon the assignee and told him that he saw no reason why the loss should not be paid, and that he would see the insured and get the proofs of loss from him. The agents of the company afterward informed him that the proofs had been obtained and were satisfactory, and that the loss would be paid.

*Held*, that the jury were justified in finding that if the proofs had not been made the company waived them. If there is any evidence from which a waiver may be inferred it is for the jury.

*Held*, that if the company, outside and beyond its special written authority, gives

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\* Decision rendered May 17th, 1873.

or encourages an agent to exercise great additional powers, and ratifies and confirms the same, it cannot, after a loss has occurred, repudiate his action and fall back upon the written authority. Judgment affirmed

W. D. Lusk, *for Plaintiff in Error.*

R. B. Little, *for Defendant in Error.*

MERCOUR, J.

A question as to the validity of the policy is raised at the threshold of this action. It is contended that it is void by reason of the omission of the assured to give notice, in his written application, of another insurance upon the same property, and to have it indorsed upon the policy. If this notice was not given to, or waived by, the company, such would be the effect. What are the facts?

Stroud and Brown, who resided at Montrose, were the agents of the company at the time this risk was taken, and had been for some three years prior; they made the contracts for insurance, fixed rates, took applications, and forwarded the same to the company. Stroud had also been an agent for the company for three or four years preceding their joint agency. They were also agents for the Lycoming Insurance Company. There was an existing insurance upon the same property in each, the Farmers' Mutual and the Lycoming, which was to expire the 23rd of October, 1868; for what sum does not appear. September 22nd, 1868, Taylor, by his agent Cafferty, applied to Stroud & Brown for an insurance of \$4,000.00 upon the property, in the Farmers' Mutual, to take effect upon the said 23rd of October. Stroud & Brown forwarded the application to the secretary of the company, at the same time saying, if the company would not like to carry \$4,000.00, they could place \$1,000.00 or \$1,500.00 in the Lycoming, and would do so. The secretary replied that he would not take the \$4,000.00, but would take the \$3,000.00. Thereupon the \$4,000.00 was changed by Stroud & Brown to \$3,000.00 in the application, and this policy was issued to Taylor for \$3,000.00, and another by the Lycoming for \$1,000.00, both to take effect upon the 23d of October, 1868. The \$1,000.00 taken in the Lycoming was not mentioned in the policy upon which this suit is brought, at the time it was issued. Strictly speaking, this insurance of \$1,000.00 was neither prior nor subsequent to the one taken by the plaintiff, but was concurrent. It took effect and became operative at the same time. Thus the company was notified by its own agents that they would, if desired, take \$1,000.00 or \$1,500.00 in the

Lycoming ; but the reply of the secretary was in effect requesting it to be \$1,000.00, and that the plaintiff would take the residue of the \$4,000.00. The risks were both taken in accordance therewith. Subsequently, but more than eight months prior to the loss, "other insurance in the Lycoming of \$1,000.00" was written in the policy by Stroud & Brown, as agents for the company, and they notified the company of it. The plaintiff then made no allegation of the absence of the previous notice, nor any objection to this addition to the policy. Besides, at the time of this addition, and for several months previous, these agents wrote the policies for the company ; and a clause in the policy stipulated that it should not be valid until countersigned by its only authorized agents at Montrose.

The property insured was of the value of about \$8,000.00. So far as it appears, the plaintiff was entirely satisfied with the acts of their agents. If the company was dissatisfied, then was the time to have indicated it. If they desired to repudiate the policy, then was the time to have done so. They could not, after a full knowledge of the facts, retain the money paid for the insurance, and withhold their objections until after the loss, thereby inducing the assured to rely upon the validity of his policy. The evidence then was sufficient to submit to the jury to enable them to find that the company had actual notice of this additional insurance at the time they issued their policy, and that it was entered in writing upon the policy by the agent, and with the knowledge of the company, some eight months prior to the loss.

Next in chronological order was the assignment of the policy from Taylor to Grow. That there was sufficient consideration between them to support this assignment does not admit of a doubt. It is assailed, however, upon the alleged ground that immediate notice thereof was not given to the secretary, and the same indorsed upon the policy, or otherwise acknowledged by him in writing. What are the facts ? The assignment given in evidence is written upon the policy, and immediately under the names of the subscribing witnesses thereto is signed "Stroud & Brown, for secretary." That was the manner in which they indicated their approval of the assignment. They testified that they were accustomed to make such assignments and report the same to the company, and had done so for three or four years ; that the company sent them blanks to fill out to make reports of such assignments as this, executed with their approval ; that this assignment was reported by them to the company upon the same day of its approval. This was the 21st of November, 1868.

The loss was on the 18th of March, 1870. The report of this assignment was in addition to the monthly reports, which they made upon the first of each month to the company. We see no error in the third and fourth assignments.

The fifth and ninth assignments of error relate to the notice and proofs of loss. The uncontradicted evidence is that Grow gave notice to Stroud & Brown, who, by the next mail, informed the company by letter addressed to the secretary. Such notice is sufficient. *West Branch Ins. Co. vs. Helfenstein*, 4 Wr., 290. In response to this notice, Walker, who was the general agent and adjuster of the company, came to Montrose, March 31st, 1870. He called upon Stroud & Brown, inquired in regard to the fire, and said he came to adjust the loss. Upon the 5th of April he went to the place of the loss, saw Grow, had full conversation with him in regard to the property, insurance and loss. He told Grow that he came as the general agent of the company, to adjust and to pay the loss, and did not see any reason why it should not be paid. He asked to have the interest deducted, and Grow agreed to deduct six per cent. Walker then left, saying he would go to Owego, see Taylor, and there take the proofs of the loss. A few days thereafter Walker told Stroud that he had gotten the proofs of Taylor, and they were all satisfactory, and they would pay the loss immediately. Stroud informed Grow of all this, and told him not to be uneasy, that the company would settle the loss. Grow relied upon this assurance. No evidence was given to contradict these facts, nor the presumption that the proofs were actually made as stated by the adjuster. If not made, the jury found the company waived them. The evidence justified the finding. *Shaw vs. Turnpike Co.*, 2 P. R., 454 ; *Lycoming Ins. Co. vs. Schuffler*, 6 Wright, 188. A particular statement of the loss may be waived by the company, and if there be any evidence from which such a waiver may be inferred, it is for the jury. *Franklin Fire Insurance Co. vs. Updegraff et al.*, 7 Wright, 350 ; *Buckley vs. Garrett*, 11 Wright, 205, and cases there cited. It follows that the court did right in submitting those facts to the jury, and we discover no error in the manner of their so doing.

If an insurance company will confine the business of their agents within the limits of the special written authority given to them, it has a right to ask that it shall not be bound by any act of the agent not warranted thereby. If, however, the company itself ignores that special authority, if outside and beyond it, it either expressly gives, or encourages an agent, to exercise great additional powers for several

years, and ratifies and confirms the same, thus holding him out to the world as rightfully exercising all those powers, thereby inducing the public to believe in, and to rely upon, his said enlarged agency, the company cannot, after a loss has occurred, repudiate his action, and fall back upon the written authority for the purpose of avoiding the legal effect of those acts, which he has done by their encouragement in the general scope of the business. The public do not see the written authority, but they do see the acts which the agent does. They know that the company ratifies them. They then have a right to presume such continued acts are within the scope of his authority, and to act upon such presumption. Such a rule is necessary to protect the people, who are obliged to transact business relating to insurance remote from the main offices of insurance companies.

The fact that Walker was the general agent and adjuster of the company, was unquestioned. His acts and declarations connected therewith, in the general scope of his employment, and communicated to Grow, was correctly received in evidence. The non-production of the written proof of loss by the plaintiff below, under the other evidence, were not fatal to his cause of action.

We think the learned judge, upon the whole, submitted the case correctly to the jury.

Judgment affirmed.

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## SUPREME COURT OF ALABAMA,

JUNE TERM, 1873.

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*Appeal from the Chancery Court of Mobile County.*

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UNITED STATES FIRE AND MARINE INS. CO.,  
*Appellant,*

vs.

ALEXIS H. TARDY, *Appellee.\**

The appellee was resident agent in Alabama of the appellant, a corporation of Maryland, which, becoming insolvent, made a general assignment and requested

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\* Decision rendered June Term, 1873.

its policy-holders in Alabama to return their policies to the home office for cancellation, when a certificate for the unearned premiums would be given them, which they could present to the assignee for settlement.

The appellee, being informed of these proceedings, without any authority from the company, cancelled in his own office all the policies issued through him, and reinsured the holders in other companies. Some of them accepted this reinsurance, and to the others, who declined, he paid out of his own funds the amount of their unearned premiums.

The appellant, under the requirements of an act of the Alabama legislature, had deposited with the treasurer of that State \$10,000.00 of State bonds "to secure the holders of policies issued by such companies to persons owning property in this State," and the appellee filed his bill to subject the deposit bonds to the payment of the unearned premiums, and also a claim created in the general course of his agency.

*Held*, that no general power of the agent to act for the best interests of the company can be construed into an authority to cancel the policies against the wishes of his principal, and that the insured were not bound by his act under any special agreement or on any general principles of law, and that the policies cannot be regarded as cancelled by him.

*Held*, that executory contracts may be rescinded or abandoned by either party when the other becomes unable to comply with his part of the obligation, and that the policy-holders were not bound to pay premiums after the insolvency of the company, but were at liberty to put an end to the contract.

*Held*, that the policy-holders were entitled to the return of the unearned premiums, and had a right to sell their demand and to transfer with it any security held for its payment, and that a contract to that effect need not be in writing.

*Held*, that the acceptance by the policy-holders of the reinsurance in some cases, and of the money in others, and the expected reimbursement of the agent out of their claim for unearned premiums, prove that inasmuch as the agent could in no event receive more than was due to them, and might receive very little, it was not a part of their agreement to relinquish whatever lien existed on the deposited bonds, but to transfer it with the debt.

*Held*, that the purpose of the act is to pay any demand occurring from the policy, the unearned premiums as well as the losses reinsured against, but that the personal account of the appellee is not a lien on the deposited bonds. Decree reversed and cause remanded.

ANDERSON & BOND, *for Appellant.*

HAMILTON & MACARTNEYS, *for Appellee.*

SAFFOLD, J.

The appellee was the resident agent of the appellant, a corporation of Maryland. The company became insolvent, and made a general assignment of all of its assets to Stewart. It notified its policy-holders in Alabama of these facts, and requested them to return their policies to the home office for cancellation before a specified time, when a certificate would be given to them for the amount due for the unexpired time, that is, the unearned premium, which they could present to the assignee for settlement when distribution to creditors should be made. Being informed of these proceedings, the said agent, with a view to the preservation of his business as an insurance agent, and supposing it was his right and duty to do so, cancelled in his own of-



fice all of the policies which had been issued through him, and reimbursed the holders thereof in other companies. Some of these holders subsequently accepted this reinsurance, and to those who declined it, he paid out of his own funds the amount of unearned premiums to which they were entitled. It was understood by him, and by those who accepted the benefit of his action, that he was to be reimbursed out of their claim upon the insolvent company. He then filed his bill, in behalf of himself and such other creditors of the company as had a right to and were willing to become parties to subject to the payment of their demands ten thousand dollars of bonds of the State of Alabama, which the company had deposited with the State treasurer in obedience to an act of the legislature, "for the protection of the holders of insurance policies, in this State," approved December 31st, 1868. Amongst other items he included an account in his favor against the company created in the general course of his agency. The corporation and its assignee were made the defendants. Subsequently, R. Inge Smith, the receiver for the administration of the bonds, appointed under an act approved December 14th, 1871, was also made a defendant. The chancellor, in compliance with the prayer, decreed the agent to stand in the place of the policy-holders who had delivered their policies to him, and ordered the proceeds of the bonds when sold by the receiver to be applied to the payment of that demand, and also of the account. No express authority was given to the agent to cancel policies, and no general power to act for the best interests of the company can be construed into an authority to cancel them against the wishes of the principal. He does not profess that his purpose was to subserve the interest of the corporation. It does not appear that he did it any injury. The insured were not bound by his act under any special agreement, nor on any general principle of law. The policies cannot therefore be regarded as cancelled by him. Executory contracts may be rescinded or abandoned by either party when the other becomes unable to comply with his part of the obligation.

*Robertson vs. Davenport & Patterson*, 27 Ala., 574; *Drake vs. Gorce*, 22 Ala., 409; *Phair & Beck vs. Batchelor*, 3 Ala., 237.

The policy-holders were not bound to pay premiums after the insolvency of the corporation, but were at liberty to put an end to the contract. In fact, it was a necessity. The circular issued to them contains a clear admission of their right to receive back the unearned premiums. The term "unearned premiums," so generally used to express that portion of the premiums accruing after the risk has termi-

nated, indicates a usage of returning it as was proposed to be done in this case. Such a usage is dictated by justice, and under the evidence the holders were entitled to the return. They certainly had a right to sell this demand to whomsoever would buy it, and to transfer with it any security held for its payment. A contract to that effect is not required to be in writing. 2 Story, Eq. Jur., § 1,047. Their acceptance of the reinsurance, in some cases, and of the money in others, and the expected reimbursement of the agent out of their claim for unearned premiums, prove that inasmuch as the agent could in no event receive more than was due to them, and might receive very little, it was not a part of the agreement to relinquish whatever lien existed on the deposited bonds, but to transfer it with the debt. The company could not object to such an agreement.

The act of 1868 (acts 1868, page 590) requires the deposit of the bonds simply to secure the holders of policies issued by such companies to persons owning property in this State. Whether under any circumstances the claimants for this fund could have priority of each other or not, the purpose of it is to pay any demand occurring from the policy, the unearned premiums as well as the losses reinsured against. The personal account of the agent, Tardy, for \$578.54, is not a lien on the deposited bonds. It did not accrue upon a policy held by him or by another whose right he acquired. The deposit was not required for such a claim. He is to that extent a creditor without security, and must stand on the footing of the general creditors for whose benefit the assignment to Stewart was made. We have considered the questions which can be raised on this appeal as well as we could without an assignment of errors. No error is discovered in the decree of the chancellor, except in relation to the personal account of the complainant, Tardy. For that the decree is reversed and the cause remanded.

## SUPREME COURT OF PENNSYLVANIA.

*Error to Common Pleas of Columbia County.*THE IMPERIAL FIRE INS. CO., *Plaintiff in Error,*

vs.

WILLIAM MURRAY, RICHARD WINLACK AND WALTER RANDALL, *Defendants in Error.\**THE NORTH BRITISH MERCANTILE INS. CO., *Plaintiff in Error,*

vs.

THE SAME.\*

The policies issued by the companies were upon property held by the defendants in error as lessees, who had assumed an obligation to return and redeliver the property in good order and condition on the expiration of the lease.

*Held*, that the lessees' interest in the property was not measured by the value of the use thereof from the time of the loss until the expiration of their term, but that their insurable interest was to the extent of the value of the property which they were bound to replace.

The policy upon property, including engines, boilers, machinery and improvements, provided as follows : " This insurance to cover their working interest in the above insured property."

*Held*, that the language of the policy was sufficiently comprehensive to cover the entire insurable interest which the assured had in the property.

*Held*, that the question of waiver as to time and particulars of loss was correctly submitted to the jury. Judgment affirmed.

MEECOUR, J.

These two cases were argued together. The facts and principles of law involved are substantially the same in each. The same property is covered by each policy ; each is for one year from the 17th September, 1869. The loss occurred January 19th, 1870.

The plaintiffs have filed twenty-three assignments of error. We will not consider them separately. The twenty-second and twenty-

\* Decision rendered May 17th, 1873.

third assignments are based upon an alleged false representation in the application. As we are not furnished with a copy of the application, we are unable to determine with certainty how far the facts go toward sustaining the allegation. As we understand the whole evidence bearing upon that branch of the case, we cannot see that the court committed any error in holding, that if the applicants fairly represented what they honestly believed, it would not defeat the action, and that it was not such a statement of a material fact as amounted to a warranty.

All the other assignments, except the first, sixth and seventh, may be considered together. They relate to the value of the interest insured. That the property was of much greater value than the amount of the insurance, does not admit of a question under the evidence ; besides, the jury has so found. It is urged, however, by the plaintiffs, that the interest of the lessees therein was of much less value, and that that lesser value only was covered by the insurance. They claim that the value of the lessees' interest therein was measured by the value of the use thereof, from the time of the loss until the expiration of their term. In this view we cannot concur. The use of the property for the remainder of the term, by no means fixed or defined its value as to them. They had not only a right to its use and enjoyment, but had also assumed an obligation to return and redeliver it in good order and condition at the expiration of the term. If they failed so to do, they were liable to their lessors for its full value. If they redeliver according to the requirements of their lease, they would be discharged from that obligation. They then had a large value in the property superadded to that of its use. Hence the court was correct in charging that the insurable interest of the lessees was to the extent of the value of the property which they were bound to replace.

The right of the insured and the liability of the companies were fixed at the time of the loss, provided the requisite notices and proofs were furnished. Such being the case, the evidence referred to in the fifth assignment of error is wholly irrelevant. No arrangement made between the Locust Mountain Coal and Iron Company of the one part, and Goddard & Draper, of the other part, after the expiration of the term of the defendants in error, released them from their obligations to return the leased property to Goddard & Draper, or pay them its value. The coal-breaker, engines, boilers, pumping and hoisting machinery, apparatus and improvements, leased to the defendants in error, were the property of Goddard & Draper, and not

the property of the Locust Mountain Coal and Iron Company. If the latter took possession of the leased premises, and released the former from all liability, it was for a valuable consideration paid by Goddard & Draper. It in no wise showed the determination of the estate which the assured had in the land at the time of the loss ; nor their release from liability for failing to restore the property upon which they had the insurance.

The language of the policy, after describing the property, avers "this insurance to cover their working interest in the above insured property." The court correctly held this was sufficiently comprehensive to cover the entire insurable interest which the assured had in the property.

The first and sixth assignments relate to the notice and proofs of loss.

We have looked in vain through the testimony to find any evidence of the extent of the powers which the companies gave to their agent Bodey. We find, however, that he was in fact exercising extensive powers. The companies were both foreign corporations, with officers and directors abroad. They also had an office in New York, and this agency in Pottsville. Bodey countersigned those policies ; he filled them up ; the applications were filed in his office ; he kept them as references ; they were not sent abroad ; he paid losses when they occurred.

There is no evidence that the companies ever questioned his rightful exercise of all those powers. So there was sufficient evidence to submit to the jury as to the extent of his agency, within the general scope of the business intrusted to his care. *Union Mutual Life Insurance Co., of Maine, vs. Wilkinson*, Insurance Reporter, 18th April, 1872, No. 16. The question of waiver as to time and particulars of loss, was correctly submitted to the jury. *Franklin Fire Ins. Co. vs. Updegraff et al.*, 7 Wright, 350 ; 5 Wright, 162 ; 6 Wright, 188 ; 11 Wright, 205.

The seventh assignment was not pressed, and has no merit. We discover no error in the bills of exception, nor in the charge of the learned judge.

Judgment affirmed in each case.

## UNITED STATES SUPREME COURT,

DECEMBER TERM, 1872.

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*Appeal from the Supreme Court of the District of Columbia.*

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CHRISTOPHER CAMMACK, JR., *Appellant*,

vs.

MARGARET F. LEWIS.\*

The husband of the appellee, being in bad health and indebted to the appellant in the sum of \$70.00, at his suggestion insured his life for \$3,000.00, under a seven years' policy. The policy was taken out by him under an agreement with the appellant that he should pay the premiums for the seven years, and that in consideration of the payments and his debt to the appellant, the appellant should, in case of his death during the life of the policy, receive two thirds of the amount of the policy, and should pay one third thereof to his wife and heirs.

The appellant paid the premium for the first year, and at the same time took from the assured an assignment of the policy and his note, which was without consideration, for \$3,000.00. The assured died before the expiration of the first year, and the appellant collected the \$3,000.00 from the company and paid the appellee one third of that sum, less the amount of the premium. The suit was brought by the appellant as administratrix to recover the remainder of the \$3,000.00.

*Held*, that so far as the appellant was concerned, the policy was a sheer wagering policy, and that the assignment to him was only valid to the extent of the debt and such advances as he might afterward make on account of the insurance.

*Held*, that there is not such evidence of a corrupt transaction on the part of the assured as to forbid the court from doing justice between his administratrix and the appellant after the amount of the insurance has been paid by the company to the latter.

*Held*, that the receipt of one third of the insurance money by the appellee does not conclude her as a settlement. Decree affirmed.

Mr. Justice MILLER delivered the opinion of the court.

This is an appeal from a decree in equity of the Supreme Court of

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\* Decision rendered , 1872.

the District of Columbia in favor of Margaret F. Lewis against appellant, Cammack.

The facts, as far as they can be gathered from the bill, answer and depositions, are substantially these :

John E. Lewis, the husband of complainant, who sued as his administratrix, being indebted to Cammack in the sum of \$70.00, and being in bad health, procured, at Cammack's suggestion, an insurance on his life in the New Jersey Mutual Life Insurance Company for three thousand dollars. Cammack paid the premium for the first year, and took an assignment of the policy from Lewis to himself.

He also took from Lewis a note for \$3,000.00 at the same time, which he admits was without any consideration, and he had Lewis's note, which he kept, for \$70.00 indebtedness really due.

Lewis died before the expiration of the first year, and Cammack collected from the company the \$3,000.00, and paid over to complainant one third of that sum less the amount of the premium paid by him and another small account which he had against Lewis. The present suit is brought to recover the remainder of the \$3,000.00, and the court below, holding that Cammack held the policy under the assignment as a mere security for what Lewis owed him, decreed that he should pay over the balance after deducting that small sum, and he appeals from that decree.

Cammack alleges that the policy was taken out under an agreement between Lewis and himself that he should pay the premiums for the seven years the policy was to run, and in consideration of those payments, and what Lewis owed him, he should, in the event of Lewis's death during the life of the policy, receive two thirds of the amount of the policy, and pay over the other third to Lewis's wife and his heirs. In support of this there is produced from among Lewis's papers, found after his death, an instrument signed by Cammack, in which he agrees to pay to the wife of Lewis \$1,000.00 in the event of his death, and of that sum being received by him on the policy above mentioned.

If the transaction as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for three thousand dollars to cover a debt of \$70.00 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him, deprives it of all pretence to be a *bona fide* effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000.00

out of the \$3,000.00 ; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception ; probably to impose on the insurance company.

Under these circumstances, we think that Cammack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterward make on account of it, and that the assignment of the policy to him was only valid to that extent.

Whether Lewis was a participant in the fraud, does not fully appear. Such conversations of his as are proved tend to show that he looked upon Cammack as a friend, to whom he was willing to trust the policy assigned, and that he never supposed more would be claimed by Cammack than what he owed him. It is also probable that he would survive the life of the policy, and with the single exception of the note for \$3,000.00, given by him without consideration, there is nothing proved against him inconsistent with that view of the matter, and with his fair dealing. At all events, we do not see such evidence on his part of a corrupt transaction, as to forbid the court from doing justice between his administratrix and Cammack, after the amount secured by the policy has been paid by the company to the latter.

The receipt of the one third of the insurance money by the complainant does not, we think, under all the circumstances of the case, conclude her as a settlement of the matter in dispute.

It is obvious that she was ignorant of the full extent of her rights; that she acted hastily and without due consideration, and was largely influenced by the advice of Mr. Chandler, who had been her husband's friend and adviser, and who was prompted to what he did by Cammack, while in ignorance of many of the facts of the case.

Besides the bill of this case, as appears on its face, is brought by her as administratrix, and the receipt by her of the one third paid on the policy was before any administrator had been appointed. If she has a right to recover all the \$3,000.00 as administratrix, it could not be defeated by her receipt of \$1,000.00, paid to her in her own right before any administration had been taken out on Lewis's estate.

On the whole, we are of opinion that the decree of the Supreme Court should be affirmed, and it is so ordered.



## SUPREME COURT OF MINNESOTA,

JULY TERM, 1871.

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*Appeal from District Court for Hennepin County.*

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GEORGE NEWMAN, *Respondent,*

vs.

THE SPRINGFIELD FIRE AND MARINE INS. CO.,  
*Appellant.\** }

The policy issued to Stanchfield provided that it should not be assignable without defendant's consent. After the making of the policy the agent of the defendant, at Stanchfield's request, indorsed on the policy "Payable, in case of loss, to George Newman, to the extent of his claim. E. B. Pierce, agent."

*Held*, that this was a mutual agreement between the parties that the policy should be thus payable thereafter, and that it was not necessary for Newman to notify the company of his claim at the time of the loss or before action brought, and that the amount he could recover would depend on the amount of his claim at the time of the fire, but by no means on defendants' knowledge in that regard.

Evidence of the acts of the agent was given before evidence of his authority, the evidence of his authority being afterward given during the course of the trial.

*Held*, that this was no ground for disturbing the verdict.

*Held*, that Stanchfield, and not Newman, was the proper person to make the proofs of loss, and that where no ground of objection is stated the exception must be disregarded.

The defendant, under the defense that the roof was defective, claimed the right to show the condition of the whole building, on the ground that the complaint alleged performance of all the conditions of the policy, one of which was that if the risk should be increased by any means whatever within the control of the assured, the insurance should be void.

*Held*, that the assured is not to plead and prove affirmatively that the risk has not been thus increased. If it has been, it is matter of defense. The defendant is confined to the proof of what is alleged.

*Held*, that a tax deed of the property to another party whose relations to the assured were such that in regard to the deed he would in equity be held as his trustee, was a cloud upon the title of the assured, but that it was not an incumbrance, nor did it make him less the owner.

The policy, which was numbered "127," contained the provision, "Reference is had to the assured's application, No. 127, which is his warranty and a part hereof." No written application was made in procuring the insurance.

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\* Decision rendered July Term, 1871.

*Held*, that the policy was the whole contract between the parties, and that the application, not being in writing, was not a part of it, and is only a representation, which, to invalidate the policy, must be shown to have embraced a statement material to the risk, and to have been untrue and fraudulently made.

The policy provided that applications should specify the construction and materials of the building to be insured, and that if any person insuring any building should make any misrepresentation or concealment, the insurance should be void.

*Held*, that this clause contemplates statements in such a written application as was referred to in the policy, and not to the verbal statements of the assured. Order denying a new trial affirmed.

HAUSER & ROBINSON, *for Appellant*.

ATWATER & FLANDRAN, *for Respondent*.

RIPLEY, CH. J.

At the trial of this cause the defendant objected to the admission of any evidence under the complaint, for the alleged reason that the same does not state facts sufficient to constitute a cause of action, in not averring an assignment of the policy set out in the complaint, and according to its terms, nor a waiver of this condition of the policy, and that the complaint does not allege notice of the amount of the plaintiff's claim, nor that he had any claim at all at the time of the loss.

Some other objections are made to the sufficiency of the complaint, but they seem to us to be unimportant, and not to require discussion. As to those above mentioned, as explained in defendant's brief, they are that as the policy upon which the action is brought is a contract with Samuel Stanchfield, the plaintiff must show an assignment by Stanchfield to himself, and defendant's consent thereto, since the policy provides that it shall not be assignable without defendant's consent. This assertion, however, is the result of a misapprehension on the defendant's part.

The complaint alleges that after the making of the policy defendant, by E. R. Pierce, its duly authorized agent thereto, at Stanchfield's request, made this indorsement on the policy, viz: "Payable, in case of loss, to George Newman, to the extent of his claim. Minneapolis, February, 1870. E. R. Pierce, agent." This was a mutual agreement between the parties that the policy should be thus payable thereafter, and the policy thereafter had the same force and effect as if Samuel Stanchfield had been thereby in the first instance in terms insured against such loss on the property in question, payable in case of loss to said Newman to the extent of whatever claim he then had on said premises. "The legal relation of a party to whom by the

terms of the policy the money is to be paid in case of loss, is most like that of the assignee of a chose in action after notice of such an assignment to the debtor, and a promise by him to the assignee to pay him ; and such assignee or such promisee may maintain an action in his own name for the money when due." *Sanford vs. Mechanics' Mutual Fire Ins. Co.*, 12 Cush., 549.

The complaint accordingly alleges in substance and effect that the claim of said plaintiff in the premises was \$5,000.00, secured by mortgage thereon ; that Stanchfield, in consideration thereof, on said first of February agreed with plaintiff that in case of loss the insurance should be paid him, and notified defendant, who by said indorsement agreed so to do.

Part of this might, of course, have been omitted ; the statement that the defendant, at Stanfield's request, thus indorsed the policy covering all of it but a statement of the fact that Newman had a claim on the building, at the time of the indorsement and loss, to an amount exceeding the amount insured.

It was unnecessary, too, for the plaintiff to notify defendant of his claim at the time of the loss, or before action brought, as it would have been for Stanchfield to have notified it that he still owned the property.

The defendant had notice at the time of the indorsement that Newman had a claim. The amount he could recover would depend on the amount of his claim at the time of the fire, but by no means on defendant's knowledge in that regard.

As to the objection that the verdict is not justified by the evidence, and is contrary to law and evidence, our examination of the case satisfies us that it discloses what is sufficient evidence reasonably tending to support the verdict, unless the exceptions taken by the defendant to the admission of material portions thereof were improperly overruled.

Whether this was so or not will appear upon an examination of the alleged errors in law occurring at the trial now to be considered.

The first is the admission of any evidence under the complaint which has already been passed upon.

The objection to the admission of evidence being overruled, said Stanchfield testified that " Mr. Stone, of Pierce & Stone, made out the policy, and Mr. Pierce signed it. Pierce & Stone were doing business together as insurance agents." The last statement was objected to " as irrelevant, it appearing on the face of the policy and complaint that E. R. Pierce alone was the agent of the defendant."

The complaint alleges that the policy was countersigned by Pierce, "the then only authorized agent *for that purpose*" of defendant, and also that in February, 1869, defendant, by said Pierce, its duly authorized agent *thereto*, indorsed the policy as above stated ; but the complaint also alleges that notice of loss was given to defendant through "its authorized agents," Pierce & Stone, and that the proofs of loss were furnished defendant by delivering them to "its authorized agents," Pierce & Stone, which proofs were made in accordance with the direction of defendant through "its duly authorized agents aforesaid."

The defendant's objection would seem therefore to have been unfounded in fact, and properly overruled.

The witness went on to state that the indorsement was written by Stone and signed by Pierce ; that he was absent from home at the time of the fire, November 19th, in St. Louis, and immediately on getting home he met Mr. Stone in the street. He was then asked, "What did Mr. Stone, at that time, say to you, if anything, about the loss?" Which was objected to as irrelevant, for the reason already considered, and for the further reason that there was no evidence that Mr. Stone was an agent of the defendant.

As to this, Stanchfield had also testified that Stone was in business with Pierce, and that he acted in the business of this insurance and this company with him, Stone making out the policy and drawing up the indorsement, and Pierce signing them.

Looked at in no other light, this nevertheless brings Stone within that provision of sec. 7, ch. 22, of the laws of 1868, that one who in any wise directly or indirectly makes or causes to be made any contract or contracts of insurance, for or on account of any foreign insurance company, shall be deemed to all intents and purposes an agent of such company.

Aside from the statute, the authority of A to act for B may be inferred from the habit and course of dealing of A and B, and the evidence above mentioned was evidence of a course of dealing of the defendant and Pierce & Stone, implying an authority to said firm, and consequently of each partner, to act for it.

These policies, it seems, were executed in blank by the officers of the company and entrusted to its agents to be filled up and then delivered, in pursuance and execution of the bargain made with the applicant, but not to be binding on the defendant till countersigned by its authorized agent.

It is evident that Pierce alone might be authorized to do this

particular thing, and yet Pierce & Stone, or either of them, or anybody else, be at the same time the defendant's agents in any other respects.

In this case we have Pierce countersigning this policy ; but this is of itself no proof that he was authorized to do so, or that he was the defendant's agent at all ; for though the authority of A to act for B may be inferred from the habit and course of dealing of A and B, it cannot be inferred from the acts of A alone, though he assumes to act for B. Starkie on Evid., Pt. IV., p. 55-59.

But when Pierce & Stone are shown to be doing insurance business in company, and Stone is shown to have the policy in his possession, filling it up in accordance with the terms of the bargain, Pierce countersigning it, and Stanchfield getting it from Pierce & Stone, it is seen that the defendant has entrusted this policy to this insurance firm for the purpose, as must be presumed, of enabling the firm to act for the company in the business for which such policy is necessary ; proof, that is to say, tending to show a course of dealing between these parties, which necessarily implies an authority on the part of said Pierce & Stone to act for the defendant in such business.

Moreover, supposing that there was not at that time evidence in the case of Stone's agency, under the statute or otherwise, enough was afterward juried to prove him such both under the statute and as one whose acts as such the defendant was aware of and had recognized. In addition to the proof in this regard hereinafter mentioned, Mr. Stone testified that the defendant knew [he] was in business with Pierce ; that he had seen the officers of the company in Springfield, and "talked with them about our business, and they knew I was with Pierce. I had also written business to the company."

That evidence of the acts of the agent was given before evidence of his authority would not therefore be ground for disturbing the verdict, the latter being afterward introduced during the trial. The objection was therefore properly overruled.

The witness stated, in answer to this question, in substance, that Mr. Stone told him to fill out proofs of loss, and defendant would settle it ; that he need give no notice of loss ; that one or two days thereafter he saw Stone again at Pierce & Stone's office, and he gave witness blanks for said proofs, and told him as there was no justice living near, he would suggest a certain notary, to whom witness took said blanks, and after the proofs were made out he handed them to Stone at said office.

To which statements of Stone, each severally, the defendant objected, for the said reason above considered, and for the further reason that it appeared "that this business had been prior thereto transacted with Pierce as the sole agent, at Minneapolis, of the defendant."

From the case as settled we are unable to perceive how this appears, for it contains nothing that we can discover in any manner tending to prove it. Inasmuch, however, as no further exception was taken, this further objection need not be considered.

Said proofs being produced and identified, and offered in evidence, and it having been stated by the witness that they were never returned to him, nor any objection made to them; that Pierce told him that he had sent them to the defendant, and he had never heard from them, and that Pierce about two weeks after delivery told him he would waive all notice of fire and loss; the defendant was here allowed to cross-examine witness as to said proofs and the delivery thereof; and plaintiff was allowed, the defendant objecting, to re-examine him thereupon, and defendant excepted. As no reason was assigned for such objection, the exception cannot be urged, and indeed, no reason was given in this court, or so far as we can see, exists for such objection.

The witness further stated that he delivered the proofs to Stone, as already stated; that they were received and not objected to at the time, nor at any time until then, and that they were not returned to witness. The defendant objected to each of these statements as irrelevant and incompetent "for the reasons already stated."

The defendant, at the close of its cross-examination aforesaid, had specified sundry objections to the reception of said proofs, as not being such as were required by the terms of the policy alleged in the complaint, and not made or delivered by plaintiff.

It is unnecessary to add anything to what has already been said to show that Stanchfield, and not plaintiff, was the proper person to make the proofs, and however defective they might be, the testimony went to show a waiver of any objection thereto for that reason.

The plaintiff was here allowed to amend the complaint, "to make the same correspond with the facts proved," and the amendment was made "as appears in the complaint on file, and the defendant objected and excepted thereto."

No ground of objection being stated, the exception must be disregarded. Moreover, taking the amendment to be such a one as hereinafter stated, we can conceive no possible reason why the



allowance thereof was not a proper exercise of the discretion of the court.

Evidence that the witness notified Stone when the premises became vacant during the risk was objected to on the ground that it in no way appeared that he was an agent of the defendant, which objection, for the reasons already given, must be disregarded.

Defendant, after cross-examining this witness, asked leave to amend the answer, "so as to deny that Mr. Stone was at any time an agent of the defendant, or authorized by the defendant to act as its agent for the purpose mentioned in the complaint, or for the transaction of any business whatever for defendant, it appearing that plaintiff had amended his complaint in accordance with leave granted by inserting the words, 'that defendant through its said agents accepted said proofs, received and retained by the same.'" The court refused and defendant excepted.

It was matter of discretion with the court to allow the amendment or not; and that this was properly exercised in the present instance, is evident from the fact that the proposed amendment in no way put in issue the additional allegations of the complaint aforesaid, because of which only the request to amend had been made, and is equally irrelevant in respect to the rest of the complaint.

The same witness being allowed to correct certain mistakes in his testimony, defendant objected to the several statements made on such correction as irrelevant and incompetent.

They were certainly and plainly material and competent, nor can we discover from the defendant's brief wherein they were supposed to be otherwise, unless the statement with respect to a vacancy occurring in one room of the premises, that the witness gave notice of the vacancy to Pierce & Stone, may have been supposed by the defendant to have been obnoxious to one of the objections already considered and seen to be groundless.

The defendant asked leave on affidavit to amend its answer by alleging that Stanchfield assigned the policy in writing indorsed thereon to the plaintiff without defendant's consent indorsed thereon, or otherwise given to the assignment, and without notice to defendant, which was refused, and defendant excepted.

Pierce, the affiant, states that "he had no information of any assignment of said policy by the indorsement of said Stanchfield thereon in writing to the plaintiff, or otherwise, until after the commencement of the trial of this cause during this term of said court, and did not know of it till the production of said policy by the

plaintiff on this trial. That said assignment was made, was kept from the defendant and from his said agent until then; \* \* \* that the consent of the defendant has not been indorsed on said policy, nor has notice of said assignment or the indorsement of defendant's consent been waived." And the affidavit contains no other statement having any reference to an assignment. It lays no foundation, therefore, whereon to base a motion for leave to make the amendment, for it nowhere alleges as a fact that the policy was ever assigned as in the amendment set out, nor does such fact appear by necessary inference.

The agent says he did not know of any assignment as described till the policy was produced in court; but of what he then or thereby became informed he does not state. So the statement "that said assignment was made, was kept from" defendant and himself till then, and they had no earlier knowledge of it, by no means necessarily implies that the policy had been assigned.

It does not necessarily follow that they had then become aware of any such fact, and so of the other statements above mentioned.

The affidavit is entirely consistent with such a state of things as is stated by plaintiff to have really existed, viz., that Stanchfield had executed an assignment on the policy, but finding it unnecessary, because of the indorsement, had never delivered it. Such, indeed, we think, on the whole case as settled, and the arguments of counsel, is the fair inference as to the matter of fact.

It may further be remarked, however, that as this policy for \$2,000.00 had been made payable to plaintiff to secure a claim of \$5,000.00, an assignment thereof by Stanchfield for the same purposes, "of all my right, title and interest" therein, "and all benefit and advantage to be derived therefrom," (which this was,) would be not only unnecessary, but ineffectual, and therefore, even if delivered without the defendant's knowledge or consent, could not invalidate the policy.

The witness, Stanchfield, being recalled and further examined by plaintiff, was further cross-examined, and the written assignment aforesaid on the back of the policy shown him. And defendant offered to prove its execution by the witness, and to offer it in evidence, to which plaintiff objected, and the objection was sustained and defendant excepted.

The witness had in no way referred to an assignment in his direct examination. It was not therefore proper on cross-examination to



prove its execution by him, still less to offer it in evidence at that time if proved ; nor could it regularly be offered at all till pleaded.

The court was right therefore in excluding the evidence if plaintiff objected.

Defendant, in the course of its evidence, offered to show by the judgment docket that there were judgment liens on the property at the time of Stanchfield's application, which was properly refused because their existence is not alleged in the answer.

Defendant was also refused leave to amend by alleging such fact. If the fact existed, as it was matter of record it was constructively known to defendant when the answer was drawn, and no offer was even made to prove that it was not actually known. The defendant suggests no reason why the refusal was not a proper exercise of the discretion of the court, and we cannot perceive any.

Defendant offered to prove the condition of the building immediately previous to the fire, but it was excluded on plaintiff's objection, and properly; as irrelevant.

The defense sets up that the roof was defective, while the offer was to show the condition of the whole building. The defendant, however, says it was competent, because the complaint alleges performance of all conditions of the policy, and one of these is that if the risk be increased by any means whatever within the control of the assured, the insurance shall be void.

The assured however is not to plead and prove affirmatively that the risk has *not* been thus increased. If it has been it is matter of defense. The defendant therefore is confined to the proof of what it has alleged in this behalf. A subsequent witness, however, was asked and answered the same questions without objection.

Defendant also offered to describe a person seen on the premises the day before the fire, with a view of identifying him as a member of Stanchfield's family, but was not allowed so to do. The evidence is apparently wholly irrelevant, and though the object is suggested to have been to affect Stanchfield with notice of the condition of the building, yet as he had been proven to have been in St. Louis at the time, any other remark than that the evidence was properly excluded is unnecessary.

Defendant, to prove its denial that Stanchfield owned the property at the time of the application, and its allegation that the policy stated that there was no other incumbrance than a mortgage described, when in fact the property had been conveyed to the plaintiff by the

which was a question for the jury, and if they had both had actual knowledge thereof, even at the time of Newman's payment of the taxes, in what possible manner can Stanchfield's repaying plaintiff for a payment made at his request, estop plaintiff, as against this defendant, from showing that the claim paid was invalid against Stanchfield? If plaintiff, at Stanchfield's request, had thrown the money into the sea, Stanchfield would still be bound to reimburse him. In what way plaintiff's receipt of the money could in that or the present case estop him, except from denying that he had received it, is impossible to see.

The plaintiff was recalled by defendant and further cross-examined, and stated, as he had already done, that the policy was taken by him as security for said \$5,000.00, made up in part of said taxes, and interest, whereupon defendant offered to show by said plaintiff that said assignment was made in pursuance of said settlement, and to offer it in evidence, to which plaintiff objected; the objection was sustained and defendant excepted.

It is unnecessary to say that no such assignment having been pleaded, the plaintiff's objection was properly sustained.

No other objections were made to evidence, except some not noticed, because they were either based on grounds herein considered, and seem to be untenable, or because no reason was assigned for them at the trial.

The court instructed the jury that "the policy in this case is the whole contract between the parties; the application, not being in writing, is not a part of it, and is only a representation, and in order to invalidate the policy, must be shown to have embraced a statement of a fact material to the risk, to have been untrue and fraudulently made," to which defendant excepted. In support of this exception it is urged, in the first place, that the application is expressly referred to in the policy, and made a part thereof, and the warranty of the assured.

The defendant itself proved that there was no written application; but it seems that the policy was numbered 127, and that the printed part thereof contains the following, (which is what defendant must have referred to,) viz.: "Reference is had to assured's application, No. 127, which is his warranty and a part hereof." Defendant says this must be intended to mean Stanchfield's verbal application. On the face of it it was evidently printed in contemplation of a written application, and through oversight was not struck out; but if it refers to Stanchfield's verbal application, the defendant fails to indicate

of fire insurance, and we see no ground of exception to it. 2 Parsons on Contracts, Book 3, ch. XIV., Fire Ins. D.

The court also read said sec. 7, ch. 22, of Laws of 1868, to the jury, and instructed them that under it they must determine whether Mr. Stone was not an agent of the defendant in view of the testimony given by himself and Pierce—Stone's evidence, so far as the question of the applicability of this statute is concerned, being as already stated, and also that both received applications and payments, and both sent money to the defendant, but that Pierce held a certificate of agency, and Stone could not, therefore, sign any contracts for defendant, and defendant did not see his name, but knew he was in the business with Pierce; that he had written business letters to defendant, and had been in Springfield and seen the officers of the company, and talked with them about their business; and Pierce's evidence being that Stone and he were partners in the insurance business, and Stone was to do the writing; both did soliciting; that Stone as well as Pierce received money for and transmitted it to all the companies they had; that both received and transmitted money, and operated for defendant in Pierce's name—and must also determine from the evidence whether the last notice of vacancy was given either to him or Pierce as an agent of defendant, and that if so, the notice was sufficient to bind the company; to which defendant excepted.

The instruction, however, was obviously entirely correct, as was the refusal to give the following instruction here asked for by defendant, which withdraws from the jury what it was for them to decide, viz., that as it appears on the face of the policy and the several signatures thereon, as well as from other evidence, that Pierce alone was agent of the defendant at Minneapolis, and in the business of this policy transacted it as sole agent with Stanchfield, he was bound to recognize him as the only person authorized to receive notice and do business for defendant with reference to this policy, as its local agent.

The 4th, 9th, 11th, and 15th requests of defendant were either refused or given with some modification, to which refusals and modifications exception was taken; but as the grounds of such exceptions have been already considered and shown to be untenable, they need not be again noticed.

So far as appears from the case, the 5th and 13th instructions asked by the defendant were mere abstractions, for it discloses no evidence to which they can by any possibility be deemed applicable;

*Held*, that there was no evidence in the record to show that the course of business of the defendant was such as to warrant an implication of authority for the sub-agent to give credit for premiums, or receive the note in payment.

*Held*, that the payment of a part of the premium could not by itself raise a presumption of an understanding that time should be given for the payment of the balance. Judgment reversed.

C. J. WALKER, *for Plaintiff in Error.*

WILKINSON & POST AND ASHLEY POND, *for Defendant in Error.*

COOLEY, J.

The defendant in error, who was plaintiff below, brought action upon a policy of insurance by which the life of her husband, William J. Willets, was insured in her favor. The issue of the policy by the company, and its transmission to their general agents in Detroit, in whose hands it was at the time of the death of Willets, were not in dispute. The application for the policy contained the following clause immediately preceding the signature of the applicant :

"It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statement shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the health (or in regard to any pecuniary interest which the insurer may have in the life) of the party insured ; any neglect to pay the premium on or before the day it became due, will render the policy null and void and forfeit all payments made thereon ; also that the policy of insurance hereby applied for shall not be binding upon the company until the amount of all premium and premiums as stated therein, which shall be due or over due, shall be received by said company, or by some person authorized to receive the same, and during the lifetime of the party herein insured."

It was claimed by defendant on the trial that the first premium upon the policy had never been paid by the insured, and that consequently the plaintiff had never become entitled to the policy or to maintain action upon it. The plaintiff claimed, on the other hand, that all of the first premium except twelve dollars had been paid in a promissory note against one Wilkie, delivered to and accepted by one Gray, who is claimed to have had authority to receive the same as payment, and with whom it is also claimed there was an understanding, expressed or implied, for some credit for the remaining twelve dollars.

but the plaintiff insists that the course of business in the office of the general agents of defendant was this : When a policy which had been applied for was received, it was delivered to the sub-agent who had solicited the same, for the collection of the premium, who was at the same time charged with the amount of the premium ; that he was allowed to make such arrangement as he pleased with the party to be insured, the company looking to him for the premium ; and that in all his dealings with such party he acted as principal, the company not being concerned in his arrangements, but looking to him for the money or the return of the policy, and it being indifferent to them whether any payment had in fact been made to the agent or not.

The evidence relied upon to make out this course of business was that of the agent, Tenwinkle, and of the sub-agent. Gray testified that he was employed by Tenwinkle & McCune, the general agents, and not by the company ; that his duties were soliciting, taking applications, returning them to the office of the general agents, receiving from them policies upon which he was to collect premiums, and then delivering them ; that he had no authority to receive anything in payment for premiums except money, and if he accepted anything else it was on his own responsibility, and he paid the money himself ; that he was paid by the month for his services ; that when a policy was received a note was made that it had been delivered to him, and he was liable to the company ; that previous to this transaction he had never taken a note of any one on a premium, and if he gave credit, he paid over the money himself and took the chances of collecting it.

Tenwinkle testified that they had no authority from the company to take notes on premiums, but had done so sometimes, discounting them themselves and accounting to the company for the money ; that when policies were received by them they were held responsible to the company for either the money or the return of the policies ; that when they delivered a policy to the soliciting agent and he did not return it, he accounted to them for the premium in money, or something they would accept as money, and if he paid money they were satisfied and did not inquire what he took of the insured.

To support the theory of the plaintiff there should have been some evidence showing, or tending to show, that the sub-agent was allowed at his option to substitute a personal liability of his own to the company, in the place of the money which he was to collect as premium ; the company being content to look to him as its debtor

contradicted Johnson directly, it would have gone very far in convincing a jury, if they believed it, that the conversation testified to by Johnson did not take place.

The other justices concurred.

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## SUPREME COURT OF ILLINOIS,

SEPTEMBER TERM, 1872.

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*Appeal from Marshall County Circuit Court.*

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THE HARTFORD INS. CO., *Appellant,*

vs.

NANCY WILCOX, *Appellee.\**

*Held*, that a verbal contract to insure, based upon a sufficient consideration, and made by a party having an insurable interest in the property, with an agent having the requisite authority to bind his principal by such contract, may be legal and binding upon the insurance company.

It was claimed that a contract of insurance grew out of a conversation at the office of Green, between the son of the plaintiff, who was acting for his father, and Howard, who was a clerk in the office, and in the absence of any other person claimed to represent the defendant.

The defendant had issued a commission under its corporate seal to Green & Black, and this was the only authority under which they acted. Prior to the conversation Black had died, and the company had not recognized Green as agent. On trial the court excluded the commission, which was offered in evidence by the defendant.

The commission was issued to Green & Black jointly, and recited that reposing special trust and confidence in their ability and fidelity, they are by authority of the board of directors thereby appointed *agent* of the Hartford Fire Insurance company, for Lacon, Illinois, and its vicinity, with power to fix rates of premium, receive moneys, and to countersign, issue and renew policies of insurance, and to give leave (when they should deem it proper) to transfer policies on behalf of said company, subject to the rules of the office, etc. It contained no words of survivorship.

*Held*, that one qualification of the general rule as to the effect to be given to a written authority creating an agency, is that the usages of a particular trade, or business of a particular class of agents, are properly admissible for the purpose of interpreting the powers which are actually given; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially commercial agents.

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\* Decision rendered September 30th, 1872.

vs. The Excelsior Ins. Co., 27 N. Y., 206. The conversations out of which it is claimed the contract arises, occurred at the insurance office of one Green, at Lacon, Marshall County, Illinois, between Levi Wilcox, the son, and acting on behalf of the plaintiff, and one Howard, [who,] in the absence of any other person, claimed to be a representative of the defendant. The plaintiff's counsel did not seem to regard Howard's authority to bind the defendant of much importance, for the only evidence he introduced tending to show that he had any power to bind the company by such a contract was the mere fact that he was at the time in Green's office, and no evidence was given by him that even Green was the agent of defendant. The plaintiff's counsel having rested his case upon the slight evidence of authority in Howard, the defendant's counsel, regarding it perhaps as some evidence, introduced Howard as a witness, who testified that at the time in question he was a clerk in the insurance office of Green & Black, at Lacon. But Black had previously died. Being shown a commission issued by defendant under its corporate seal to Green & Black, bearing date August 3rd, 1865, the witness identified and proved the same, and testified that the commission was the only authority under which they acted; that they had no authority to issue policies, except according to the commission, and none outside of it. The commission was then offered in evidence by the defendant's counsel, but, upon general objection by plaintiff's counsel, the court ruled that it was not admissible in evidence, to which ruling exception was taken. The commission offered is preserved in the bill of exceptions, and we find, upon inspection of it, that it runs to Edward Green and I. Lincoln Black, jointly, reciting that reposing special trust and confidence in their ability and fidelity, they are by authority of the board of directors thereby appointed *agent* of the Hartford Fire Insurance Company for Lacon, Illinois, and its vicinity, with power to fix rates of premium, receive moneys, and to countersign, issue and renew policies of insurance, and to give leave (when they should deem it proper) to transfer policies in behalf of said company, subject to the rules of the office, etc.

The power of attorney contains no words of survivorship.

It is a general rule that where the agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers, because that would be to contradict or vary the terms of the written instrument. In connection with

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sentation was accidental, unintentional, and without any fraudulent intent, as the insurers were misled; that the minds of the parties never met upon the organ factory as the subject matter of the insurance, and that it was decisive of the case that the policy could not be applied to the building which was destroyed, and that as the insured accepted the policy in its present shape he cannot complain that he has been misled by it. The case was decided in the Supreme Judicial Court of Massachusetts, on a statement of facts, and judgment rendered for the defendant.

In the *Farmers' Mutual Fire Ins. Co. vs. Tylor*, the Supreme Court of Pennsylvania decided that when a company outside of and beyond its special written authority encourages an agent to exercise great additional powers for several years, and ratifies his acts, thereby inducing the public to rely on his enlarged agency, the company cannot, after a loss has occurred, repudiate his action and fall back upon the written authority for the purpose of avoiding the effect of his act. The questions arising in the case relate to notice of prior insurance, assignment of policy, and waiver of proofs of loss. The judgment of the court below was affirmed.

The case of the *United States Fire and Marine Ins. Co., vs. Tardy* was decided in the Supreme Court of Alabama. The company had become insolvent, and the main question related to the plaintiff's claim, under the policy-holders of the company, to a deposit of \$10,000.00, made by the company, under the State law, with the State treasurer, to secure the holders of policies in that State. The court held that the policy-holders were entitled to a return of the unearned premiums, and that the deposit was subject to pay any demands occurring from the policy—the unearned premiums as well as the losses insured against; but that it was not subject to pay personal accounts of the agent against the company, which arise in the general course of business.

The case of the *Imperial Fire Ins. Co. vs. Murray et al.* was argued at the same time with the North British Mercantile Ins. Co. against the same parties as defendants in error, both cases involving the same facts and principles of law. The policies were issued by the companies upon the working interest of the defendants in machinery and improvements used in working a coal mine, and which they held as lessees and were to redeliver in good order and condition at the expiration of the lease. The court held that the policies covered the entire insurable interest the insured had in the property, and that their interest was to the extent of the value of the property they were

## FIRE COMMISSIONERS.

[The following is a portion of the argument, made before the special committee of the City Council of Boston, by George O. Shattuck, Esq., in behalf of the petitioners for the creation of a board of fire commissioners:]

You, gentlemen, are called upon to deal with one of the greatest questions of the age : How shall we protect life and property in our large cities, and preserve our republican form of government? And, as I say, the best method for the administration of this department which has been anywhere yet devised is by a responsible commission, appointed by a responsible head. There are certain advantages in popular elections. Legislators should be elected that they may sympathize with the people, that they may pass laws for the public benefit. But when you come to matters of administration, when you come to the employment of physical force—to meeting fires, to building streets—you want, not sympathy with the people, but power and efficiency; and that power and efficiency can only be obtained by securing intelligence, skill, permanency and responsibility in the board which you establish. Originally, under our town governments, the money was voted at town meeting by the people; the administration was in the hands of select men, elected by the people. Boston was governed in this way for almost two centuries; but when its population had increased, in 1822, to 50,000 or more, it became necessary to change that administration. The people could no longer meet in Faneuil Hall, and it became necessary to delegate the power of making appropriations and of managing the government. At that time Chief Justice Shaw was employed to devise a method of administration suited for that time, suited to a city of fifty thousand inhabitants. He took the old system, in part; he transferred the powers of the select men to the aldermen; he transferred, in part, the powers exercised by the people in town meeting to the City Council. That worked very well with a population of fifty thousand. The aldermen were not to be paid. They not only held the powers of the select men, but all the powers of the county commissioners for the county of Suffolk were vested in that board. This worked very well at that time. But the city has grown from one of fifty thousand inhabitants to one of two hundred and fifty thousand. Water, with which each man then furnished himself from his own well, is now furnished by the city. We have our Health Department, which was then un-

well. But it has been found that in the administration of affairs requiring peculiar skill and education, the system fails, and we have therefore, in the course of the last eighty years, been gradually remedying the defect by establishing permanent boards, not elected by the people, to take charge of matters which require efficiency, skill, and peculiar knowledge. We ask you to apply the remedy to this case of admitted failure.

Now what do we ask of this commission? I do not intend to go into details, and point out the defects in the existing system, but simply to address myself to the question whether we should have a commission or not.

In the first place we ought to have a paid commission; and I think you will find it a universal rule, that executive officers are never efficient unless they are properly compensated. You cannot fix in the mind of a man a proper sense of his obligations to the public as an executive officer if he is rendering his services without compensation; and I challenge you to find any case, under any government, where this practice of requiring services from executive officers without compensation has been successful. Take it in England. The members of Parliament are not paid; the legislators, the men who appropriate the money, are not paid; but the Cabinet, the executive department, is paid with great liberality; and the member who serves on a committee is paid for his services there; so that the persons who are not compensated are only those who attend to the legislative business, to the appropriation of money, and to the supervision of the other departments, without any executive duties. And that, in my judgment, will ultimately be the duty of the aldermen and council. They will be the legislators; they will make the ordinances for the city; they will appropriate the funds of the city; they will supervise and look after the efficiency of all the departments. But to ask of twelve men, or any number of men, that without compensation they shall perform the executive duties of a government, is unjust to them. It is placing a duty upon them without doing that which will impose upon them a proper sense of responsibility. I say, therefore, that if you go the world over you will find that men who hold executive offices are paid for their services. They should be paid, and then the people will hold them to a proper responsibility, and have a right to do it.

I would have, in the next place, a permanent board. This business of putting out fires requires peculiar knowledge. A man must be educated to it. I should like to read from a communication from the

struction and location of engine-houses ; a third committee takes charge of fire-alarms, while a distinct department places or removes the hydrants. Thus, the means of extinguishing fires are parcelled out among four bodies of officials. Unity of action, rather than division of labor, would seem desirable in this matter."

Now, we ask you that this commission which you shall establish shall have full power. I do not say that they need to have control of the water of city of Boston. Perhaps it would be sufficient that they have power to locate hydrants. I think this commission should have the control of the fire alarm. They should also have something to do with the inspection of buildings. An efficient fireman ought to know the interior of every building in his district. That is a part of his education. They ought to study that matter carefully ; and in order that they may do so, we must have a body with full power, with all this responsibility upon them, and with permanency enough to enable them to understand their business.

In the next place we say that the commissioners should be appointed by the mayor, that he may be responsible for their appointment. They may be confirmed, perhaps, by the board of aldermen. But let the mayor select the men who are paid for this duty. Somebody has said here that the best men are among our fire engineers. That may be. I should not be surprised if the three best men to constitute this commission were to be found among the fire engineers of Boston. If they are, appoint them. If, however, anybody else should be found more competent let him be appointed. But throw the responsibility upon the mayor, or upon somebody, to select the men. Do not make it necessary for them to work to secure the popular vote. Do not make them liable to be turned out at any time, unless for inefficiency or good cause. But make the mayor responsible for their appointment ; give them permanency enough to learn their business, and power enough to discharge their duties efficiently ; and then when a fire occurs we shall know on whom to throw the responsibility. Look at the scene which has been presented to us during the last few months. People went to the mayor and complained to him about the great fire. He could only suggest and nominate ; he could not control the aldermen ; he could not appropriate money ; he could not do this or do that. You go to the head of the fire department and he says, "I cannot control the fire alarms ; I cannot do this, I cannot do that ; I have been impeded at every point ; therefore I am not responsible." Who are the aldermen ? I do not think one man in fifty knows who the committee are who have charge

in the question, who will not tell you that experience has shown uniformly that the greatest efficiency in this department has been secured in this country only from permanent fire commissions.

But we have not only the voice of these insurers, and of more than eight thousand petitioners, including among them the largest taxpayers and the most intelligent citizens of Boston, who come here and earnestly ask that this department may be placed in the hands of a commission, but besides these, you have the testimony of the commission appointed by Mayor Gaston to investigate into the management of the great fire of November 9th. They had over forty hearings, and took a mass of testimony, filling a large volume, in a thorough examination of this question ; and after making that examination, after making themselves more familiar with the workings of the Fire Department than any men outside of it have ever made themselves, they come here and unanimously and earnestly recommend, as the best remedy for this evil, the appointment of a fire commission. And as I have said, we have the experience of New York, of Chicago, and of London. We have also this testimony of the working of the fire commission in New York in the diminution of the losses by fire. As was very fairly said by one of the witnesses, a fire may be accidental, and therefore the figures of any small number of years cannot be a perfectly trustworthy test of the efficiency of any department, but when we find the loss by fire diminishing regularly year by year, from \$4,057,376.00 in 1868, down to \$1,545,748.00 in 1872, I think that it is substantial and strong evidence of the efficiency of that department. But the fact that the number of fires promptly extinguished has been steadily increasing, is more conclusive evidence still. It appears in the report of the Fire Marshal that 73.84 per cent. of all the fires in New York show a loss of less than \$100.00 each ; 22.03 per cent. show a loss of between \$100.00 and \$5,000.00; and only 4.13 per cent. show a loss of above \$5,000.00. That is even stronger testimony than the fact that the losses were diminished between 60 and 70 per cent. between 1868 and 1872.

ducing the people to protect themselves, just where they can, by regarding truths so easily to be understood. Money invested in a policy written for three quarters upon a risk manifestly worth one and a half, or two per cent., is badly invested. The insurer may be able to pay a first loss, because his capital is new, but his ability to pay a second will be impaired; a third would have to be met by an assignment; and a fourth would not be worth the paper it was written upon. Sound companies, managed by experienced men, have published scales of premiums covering nearly all ordinary, hazardous and specially hazardous risks, with uniform instructions to determine rates for extra hazards, and to point out uninsurable property. These book-rates are not made by guess, nor for the purpose of catching the unsophisticated. They are founded upon a long experience in profit and loss, and are as low as safety will admit them to be and give the capitalists who furnish the security of the stock a decent price for the use and risk of their money. No widening of streets in cities; no improvements in architecture; no new appliances in fire-extinguishing apparatus, will avail in making insurants safe until they also learn that indemnity has a fair cost price, and become willing to pay it. And if they do not second the efforts of the underwriters to maintain adequate rates by paying them, insurers will withdraw their capital, and insurants must look out for themselves. \* \* \* It seems to me that the rule should be established by law that the actual unearned premium should be charged up as the reinsurance fund at any time. It will not get over the evil alluded to, of undercutting in rates, as well as a valuation upon a scale of uniform minimum premiums would, but it will be an incentive to the guilty companies to stop the practice. It will also, in every company

that does write up to book rates, obviate the necessity for extra reserves, and allow the stockholders to realize their profits, if any, when made, and not subject them to loss by capitalizing or depositing them for its use with the company. The greater promptitude in paying to capitalists profits actually made, great or small, so that they can have the immediate benefit thereof, the greater will be the inducement to invest money in the hope of such profits. And after all, notwithstanding what may be said of the apparent necessity of leaving portions of profits on insurance capital on deposit for provision against extraordinary emergency, it is doubtful if any rule of law or voluntary agreement can be made which will be wholly adequate. The world cannot be indemnified against all possible calamities. Earthquakes have happened in territory distinguished for steadiness and gravity. Mankind must assume some risks; and when that portion of it which seeks the protection of the insurance companies has been for many years satisfied in being reimbursed for all ordinary losses encounters a disaster as great or greater than that which swept our sister city, it must be expected that even insurers are not insured, and that such universal losses, which occur once in a lifetime, cannot be provided for by the light of any experience."

The Superintendent also recommends that the laws of the State be so amended as to require that all stock companies hereafter formed shall have a paid-up cash capital of at least \$200,000.00; that this capital and twenty per cent. of the company's remaining assets shall be invested in the manner now required in the case of life companies; that a certain portion of the unearned premiums shall be held as a reinsurance fund, and that the Superintendent shall have power to compel a return by outside companies of the business done in the State.

#### BOSTON FIRE DEPARTMENT.

If your building is on fire, send for small engine at ———, and fill your tubs and pails with water, and take them near the fire to be ready for use. Send also the alarm to the nearest telegraph box. Do not remove your furniture, as the fire will be out in a few minutes and make it unnecessary.

Keep this card hung up where it may be seen, and call the attention of the inmates to it.

#### Chief of the Second Brigade.

Such a fire-preventive and fire-fighting department should be placed in every city and large town in the United States. Where the Holly or other water pressure system is in use it would only be necessary to add the small engines for instant service. The hook and ladder companies may remain as at present, but with a premium of one thousand dollars for a ladder convenient, cheap and safe, which should be so great an improvement as to cause its introduction by the city.

The cost of the Boston Fire Department for 1872 was \$399,249. The cost of the three thousand engines, chief and assistants, with cards and all expenses, would be less than \$50,000. That is, the whole second brigade the first year, purchasing all new engines, etc., would cost less than the land and house of one steam-engine, and working it one year! The power of the twenty-one steam fire-engines is ten thousand five hundred gallons of water per minute; of the four thousand engines twenty-four thousand gallons per minute. The succeeding years the second brigade would cost perhaps fifteen thousand. But even this is not all there is in favor of the new system. Almost all of our fires would be put out without an alarm, and there would be few or no more conflagrations.

Now as a very great proportion of the firemen work out of the department,

and could be employed all the time at full pay, the city could reduce their salaries one half, quite to their advantage, and so that also of their other employers, and that of the men as well. A saving of forty thousand dollars per annum could be made in this way. Then the savings from the present wear and tear of engines, horses, etc., would be more than the annual expense of the second brigade after the first year. But the financial advantage which would be felt most would be that of insurance. The rate of insurance would not be more than one half of the present, while the insurers would be better paid than at present. Millions of dollars would be saved every year to the citizens of Boston.

There are two doubts which may arise in some minds, and which I propose to examine.

The first is, Are the small engines really so efficient? I answer this question in the affirmative, and ask that a competent committee be appointed to make the proper investigations and experiments. All civilized nations do this when proving the best munitions of war, and surely this war of fire has become serious enough for us to wish to employ the best weapons against it.

The second doubt is, Would the small engines be worked efficiently? Would not those who have them be confused, excited or terror-stricken, as people now are? Ask an army without weapons to stand up against one pouring showers of bullets, grape and shell into them! Would not they run away in terror? The people near a fire have now no means of offense against it. Put them into their hands and they will at once go to work.

Every one of the four thousand men will become firemen; and working firemen, too, at the very time and place where fire is most easily and successfully arrested.

From this table it will be seen that New York compares favorably with all the leading cities except London and Paris, even with its abnormal death rate of 1872. In the previous year, the rate of New York was 28; London, 24; Liverpool, 35; Berlin, 38, and Vienna, 32; this year the comparison promises to be even more favorable to this city.

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## ITEMS.

Of the thirty-seven States now composing the Union, but seven require any deposit of money or bonds from American companies, as a condition precedent to the transaction of business by agents within their limits. No deposit is required in the following States from an American company, except from the companies of those States which require deposits from the companies of other States: Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont and Wisconsin. The insurance legislation of nearly all these States is retaliatory.—*Northwestern Review*.

From a paper on the locomotive engine, by Joseph Harrison, Jr., read before the members of the Franklin Institute of Pennsylvania, February 21st, 1872, is taken the following paragraph:

"The engineer, noting the curious things in bronze and in copper exhumed at Pompeii, and gathered together in the Museo Borbonico, at Naples, will linger near a small vessel for heating water, little more than a foot high, in which are combined nearly all the principles involved in the modern vertical steam-boiler—fire-box, smoke-flue through the

top, and fire-door at the side, all complete; and, strange to say, this little thing has a water-grate made of small tubes crossing the fire-box at the bottom, an idea that has been patented twenty times over, in one shape or another, within the period of the history of the steam engine."

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Wirt once said; "Old-fashioned economists will tell you never to pass an old nail, or an old horse-shoe, or buckle, or even a pin, without taking it up, because, although you may not want it now, you will find a use for it some time or other. I say the same thing to you with regard to knowledge. However useless it may appear to you at the moment, seize upon all that is fairly within your reach, for there is not a fact within the whole circle of human observation, nor even a furtive anecdote that you read in a newspaper or hear in conversation, that will not come in play some time or other; and occasions will arise when they will involuntarily present their dim shadows in the train of your thinking and reasoning as belonging to that train, and you will regret that you cannot recall them more distinctly."

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The British life-boat service seems to be one of the most successful instrumentalities for saving human life now in existence. Its last yearly report shows that 234 boats are now employed on the entire coast of the United Kingdom, through whose exertions the lives of 569 persons have been saved, and nearly all of them were rescued under circumstances of peril that would have precluded any ordinary boat from proceeding to their aid.

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Hon. Horace Gray has been appointed to fill the office of Chief Justice of Massachusetts, left vacant by the death of Judge Chapman.



of 60, where a few of the English rates are under the American standard. In mutual companies the German are in about 56, and the English in about 44, per cent. of cases cheaper than the American. Between the English and the German the lower rates are found among the latter.

—A Berlin correspondent of the *Pall Mall Gazette*, writes :

"The Berlin fire brigade is composed of a fire director, who exercises supreme command ; a fire inspector, and four fire-masters, all of whom are architects, and belong to the army reserve ; forty-eight firemen, holding the rank of non-commissioned officers ; and 196 privates, all bricklayers and carpenters by trade, and strong, healthy, and active men, who have served their time in the army. Besides the foregoing, there is a corps of 800 laborers, acting under the direction of the firemen, and who are employed besides as the general scavengers of the city. Two thirds of the firemen are always on duty, while the remaining third are at liberty to follow their ordinary avocations, the general rule being for one day off duty, to follow two days on. As regards the officers, however, there is no such regulation. The inspector receives a salary of 1,350 thalers, about £200 per annum ; the fire-masters, 950 thalers, or £142 ; the foremen, £87 ; the privates, £57 ; and the laborers, who have to give all their time, £52. They receive their uniforms, of course, in addition. The brigade possesses 7 floating engines, 42 horse fire-engines, 9 hand engines, 4 fire-escapes, with feeding pumps, water-trucks, vans for firemen, hose trucks, ladders, etc., in proportion. At least one fire-engine forms headquarters attends every fire, whether large or small, and at important fires the entire brigade turns out. In connection with the Berlin fire-brigade there are 65 principal telegraph stations with signaling apparatus

and 68 smaller stations with simply warning apparatus. The entire annual cost of the Berlin fire-brigade, including its system of telegraphy, averages between £27,000 and £28,000, of which nearly £5,000 is contributed by the government, the remainder being borne by the municipality. While taking full credit for the admirable discipline of the men under his command, Fire-Director Seabell attributes the mastery which the Berlin brigade almost invariably gains over even the most threatening fires to three causes : 1. The completeness of its telegraphic system, which insures instant intimation of a fire having broken out. 2. The large number of fire-plugs, and the mains being always turned on. 3. The breadth of the Berlin streets, and absence of courts and other narrow thoroughfares, such as abound in London."

—The Dwelling House Insurance Company, of Boston, Mass., wrote on nearly four millions of dollars worth of property during the first four months after it commenced business. It insures dwelling houses only, and has found the specialty very profitable. The capital was increased in April from \$200,000 to \$300,000. Mr. Arthur William Hobart, late president of the Mutual Benefit Fire, of Boston, an experienced and capable underwriter, is its president.

—The following toast was pronounced at a firemen's dinner, and was received with great applause : "The ladies. Their eyes kindle the only flame against which there is no insurance."

—A fellow in Dublin once committed a trifling offence, for which the judge pronounced the following sentence : "The sentence of the court is, that you shall be flogged from the Bank to the Quay." The prisoner, hastily interrupting the judge, said, "Thank you, my lord, you have done your worst." "No," returned the judge—"and back again."

leave (when they should deem it proper) to transfer policies in behalf of said company, subject to the office, etc. It contained no words of survivorship, and was the only authority under which they acted. Prior to the conversation Black had died, and the company had not recognized Green as agent. On trial the court excluded the commission, which was offered in evidence by the defendant. *Held*, that "it is a general rule of the common law that when an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it, for the authority is construed strictly, and the power is understood to be joint, and not several."

Story, Agency, § 42, and cases cited in note 2.

*Held*, also, that one qualification of the general rule as to the effect to be given to a written authority creating an agency is "that the usages of a particular trade or business, or of a particular class of agents, are properly admissible—not indeed for the purpose of enlarging the powers of the agents employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority are included in the power and may be resorted to by all agents, and especially commercial agents."

Story, Agency, § 77.

*Held*, also, that another qualification applies "when parol evidence seeks to establish a subsequent enlargement of the original authority, or to give an authority for another object, or when the express power is engrafted on an existing agency, affecting it only *sub modo* to a limited extent."

Story, Agency, § 79.

*Held*, also, that there is another qualification "where there was a written authority to the agent, but the principal by his declarations and conduct has authorized the conclusion that he had in fact given more extensive powers to the agent than were conferred by the writing. Then, as to all persons dealing with such agent upon the faith of such apparent authority, the principal will be bound to the extent of such apparent authority." *Held*, also, that "subject to these reasonable qualifications and limitations, the doctrine is unquestionably true that an express written

authority cannot be enlarged by parol evidence, or an au be implied where there exists an express one."

Story, Agency, § 83.

*Held*, also, that under the joint commission, without some c cation of it, or some recognition of Green as agent, neit nor, of course, his sub-agent could bind the company, an under the facts, "if the commission had been admitted i dence, the plaintiff could establish a right of recovery or the introduction of parol evidence falling within some recognized qualifications to the general rule as to the effect given to a written authority as above indicated in this opini

*The Hartford Ins. Co. vs. Wilcox.\**

Rep'd Jour'l p. 700.

Ins

§ 159. FIRE.—*Verbal Contract with*.—It was claimed t contract of insurance grew out of a conversation at the off the company's agent, between the son of the plaintiff, who acting for his father, and a clerk in the office, who, in the ab of any other person, claimed to represent the defendant. that "it seems to be well settled by the authorities that a contract to insure, based upon a sufficient consideration, and by a party having an insurable interest in property, with an having the requisite authority to bind his principal by such tract, may be legal and binding upon the insurance compan

Commercial Ins. Co. vs. Union Mutual Ins. Co., 19 How., 318 ; ton vs. Lycoming Ins. Co., 5 Penn. St., 339 ; City of Davenport v ria Ins. Co., 17 Iowa, 276 ; Bragdon vs. Appleton Ins. Co., 42 Me Andrews vs. Essex Ins. Co., 3 Mason, 6 ; McCullough vs. Eagle Ir 1 Pick., 278 ; Palm vs. Medina Ins. Co., 20 Ohio, 529 ; Trustees Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 305 ; Audubon vs. T celsior Ins. Co., 27 N. Y., 206.

*The Hartford Ins. Co. vs. Wilcox.*

## CAPITAL STOCK.

§ 160. FIRE.—*Illegal Increase of—Avoidance of Assess Amendment of Charter—Liability of Stockholder*.—The acti

\* Decision rendered September 30th, 1872.

brought by plaintiff as assignee in bankruptcy to enforce the collection of an assessment of sixty per cent. on the par value on ten shares of capital stock held by the defendant in the company. The original charter of the company provided that the capital stock should be \$1,000,000.00, which might be increased not to exceed \$5,000,000.00, at the discretion of the stockholders, but no mode of procuring the assent of the stockholders to the increase of stock was prescribed by the charter. The board of directors, before the defendant subscribed to his stock, passed a resolution to increase the stock to \$5,000,000.00. The stock issued to the defendant was in excess of the \$1,000,000.00 authorized by the original charter, and he was ignorant of the increase of the stock or of the amendment of the charter until after the suit was brought. After the defendant had subscribed to the stock, a report was made at a regular annual meeting of the stockholders, including a majority of the original stockholders, showing that over three millions of stock had been issued. At this meeting the old and new stockholders voted for directors indiscriminately, and no objection to the increase of stock was then or ever afterward made. The proceeds of all sales of the stock was treated as capital by the directors. Afterward the charter was amended so as to authorize the directors to increase the stock, and after this, as well as before, they recognized the validity of all stock issued. Three dividends were made upon all the stock, and the defendant received two of these dividends. *Held*, that "the original charter of the company contemplated that any increase of the capital stock beyond one million of dollars should be assented to by the stockholders as distinguished from the directors." *Held*, also, that "in a meeting of the stockholders of the original million of stock, duly convened, a majority might determine upon such increase and bind the minority." *Held*, also, that "from the proofs in the case we find that at least four fifths of the original million of stockholders did know of and assent as early as January, 1869, to this increase of stock, and are of opinion that the requisite assent of the stockholders can be shown by their conduct and acquiescence, and need not necessarily be established by any formal vote or resolution." *Held*, also, that "the original charter, contemplating that stock might be issued to the extent of \$5,000,000.00, and

that amount never having been quite reached, the amount of the charter was not of such a radical character as to charge a non-assenting stockholder from his liability respects his unpaid stock."

*Payson vs. Withers*, 5 Chicago Legal News, 445.\*

*Held*, also, that as defendant's stock was no part of the original million, but was part of the stock issued in excess prior to the date of the amended charter, "this stock could not be legal, and no action could be maintained to recover the price of it, unless the stock has become legal stock by subsequent events occurring, or unless the defendant under the charter proved is estopped to set up this objection." *Held*, also, inasmuch as the company for several years, and till its dissolution by the great fire at Chicago, "did business and declared dividends on the basis of having nearly \$5,000 of stock out, a fact not disguised nor concealed, but proclaimed to the world, the defendant, as a holder of a stock certificate which he still retains, and receiving dividends, which he retains, will not be permitted, by the principles of law, to escape a liability imposed for the benefit of creditors, that at this late day, that he is a stockholder in the company, and particularly ought this to be so in view of the amendment of the charter, by the legislature, giving the directors the power to increase the stock, and their subsequent action, ratifying what they had previously done."

*Payson, assignee, vs. Stoeber*.†

Rep'd Jour'l p. 733.

U. S. C. C., D. C.

§ 161. FIRE.—*Avoidance of Assessment—Liability of stockholder—Bankruptcy—Assignee and Assets.*—The company was adjudged bankrupt, and this action was brought by the plaintiff assignee in bankruptcy to enforce the collection of an assessment of sixty per cent. on the par value of ten shares of stock held by the defendant in the company. *Held*, plaintiff, as assignee in bankruptcy, represents, as against the stockholders, the rights both of the bankrupt company and its creditors, and that all the claims of the creditors must be established in the Bankrupt Court and its assets collected

\* 2 Ins. Law Jour'l, 599.

† Decision rendered June Term, 1878.

tributed under the superintendence of that court. *Held*, also, that "the assignee can only collect so much of the unpaid stock as may be necessary to satisfy debts provable in bankruptcy against the company, and the necessary costs and expenses of administration; and it follows that the necessity for the sixty per cent. assessment made by or under the direction of the Bankruptcy Court, is not collaterally inquired into in every or any action brought to enforce payment of such assessment. Such questions must be decided in that court. If more is assessed and collected than is necessary to pay claims against the estate, any stockholder may apply to that court for his proportion of the surplus."

*Upton vs. Hansbrough*, 5 Chicago Legal News, 242.

*Held*, also, that whether the company under its charter could before bankruptcy have collected from its stockholders the full amount of their unpaid stock, or only so much as might be necessary to pay "losses" proper, as distinguished from "liabilities," the unpaid stock is clearly liable to *creditors* for all debts and liabilities.

*Ogilvie vs. Knox Ins. Co.*, 22 How., 380, 387.

*Payson, assignee, vs. Stoever.*

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## EVIDENCE.

§ 162. *LIFE.—Experts—Physician.*—The physician who examined the assured at the time of the application was asked on the trial as to the effect the facts assumed would have had upon his judgment and action had they been disclosed by the applicant. *Held*, that the questions asked were properly excluded as incompetent.

*Higbie, Ex'r, vs. The Guardian Mutual Life Ins. Co.\**

*Rep'd Jour'l* p. 761.

H. Y. C. A.

§ 163. *LIFE.—Experts—Physician.*—Medical witnesses testified that the state of health indicated by the report of the company's medical examiner, made at the time of the application, and verified by him on the trial, was inconsistent with the functional derangement of the brain claimed and alleged by the com-

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\* Decision rendered May 7th, 1873.

## PREMIUM.

§ 166. *LIFE.—Partial Payment of—Authority of Sub-agent.*—The plaintiff in error issued a policy in favor of the defendant upon the life of her husband. The application contained a clause providing that any neglect to pay the premium when due should render the policy null and void, and that “the policy of insurance hereby applied for shall not be binding upon the company until the amount of all premium and premiums as stated therein, which shall be due or over due, shall be received by said company or by some person authorized to receive the same, and during the lifetime of the party herein insured.” The policy was transmitted by the company to its general agents, and was delivered by them to their sub-agent to collect the premium thereon, and then to deliver it to the insured. The insured stated that he was unable to pay the premium, and he thereupon took from him a promissory note against a third party, amounting to only a portion of the premium. The policy was not delivered to the insured, but was in the hands of the general agents at his death. The sub-agent was employed by the general agents as a solicitor, and to deliver policies and collect premiums. *Held*, that “a sub-agent employed by the agent of an insurance company to solicit applications for insurance, collect premiums and deliver policies, has certainly, by virtue of such employment, no general authority to give credit or receive anything but cash in payment. This is too plain to require the citation of authorities.” *Held*, also, that “if a collecting agent for any reason of his own pays to his principals the amount of a demand which he has not collected, it would be a violent inference from that fact that he was authorized to discharge other demands without payment.” *Held*, also, that there was no evidence that the sub-agent “had authority to give credit, and if he had, the payment of a part of the premium could not by itself raise a presumption of an understanding that time should be given for the payment of the balance.”

*The Continental Life Ins. Co. vs. Willets.\**

Rep'd Jour'l p. 695.

MICH. S. C.

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\* Decision rendered January 11th, 1873.

## STATE DEPOSIT.

§ 167. FIRE.—*Assignment of Unearned Premiums—Insolvent of Company—Cancellation of Policies by Agent.*—The appellant was resident agent in Alabama of the appellant, a corporation of Maryland. The company, becoming insolvent, made a general assignment and requested its policy-holders in Alabama to return their policies to the home office for cancellation, and a certificate for the unearned premiums would be given to which they could present to the assignee for settlement when contribution to creditors should be made. The appellee being informed of these proceedings, without any authority from the company cancelled in his own office all the policies which had been issued through him, and reinsured the holders in other companies. Some of these holders accepted this reinsurance, and the others, who declined, he paid out of his own funds the amount of their unearned premiums. The company, under the requirements of an act of the Alabama legislature, had deposited with the treasurer of that State \$10,000.00 of State bonds. The act required the deposit to "secure the holders of policies issued by such companies to persons owning property in this State." The appellee filed his bill in behalf of himself and others to sell the deposited bonds to the payment of their claims, including his claim, besides the unearned premiums, an account in his favor created in the general course of his agency. *Held*, that the policy-holders had a right to sell their demand and to transfer it with it any security held for its payment, and that a contract to that effect is not required to be in writing.

2 Story, Eq. Jur., § 1,047.

*Held*, also, that "their acceptance of the reinsurance in such cases and of the money in others, and the expected reimbursement of the agent out of the claim for unearned premiums, justify that inasmuch as the agent could in no event receive more than was due to them, and might receive very little, it was not a breach of their agreement to relinquish whatever lien existed on the deposited bonds, but to transfer it with the debt." *Held*, that the purpose of the act is to pay any demand occurring on the policy, the unearned premiums as well as the losses rein-



against, but that the personal account of the agent is not a lien on the deposited bonds, as it did not accrue upon a policy held by him or by another whose right he had acquired. *Held*, also, that no general power of the agent to act for the best interests of the company can be construed into an authority to cancel the policies against the wishes of his principal, and that the insured were not bound by his act under any nor on any general principle of law, and that the policies cannot be regarded as cancelled by him.

*United States Fire and Marine Ins. Co. vs. Tardy.\**

Rep'd Jour'l p. 572.

ALA. S. C.

### UNEARNED PREMIUMS.

§ 168. FIRE.—*Insolvency of Company.*—The appellant, an insurance company, became insolvent and made a general assignment of all its assets, and notified its policy-holders of the fact. *Held*, that "executory contracts may be rescinded or abandoned by either party when the other becomes unable to comply with his part of the obligation,"

(Robertson vs. Davenport & Patterson, 27 Ala., 574; Drake vs. Gorce, 22 Ala., 409; Phan & Beck vs. Batchelor, 3 Ala., 237.)

and that "the policy-holders were not bound to pay premiums after the insolvency of the corporation, but were at liberty to put an end to the contract," and that they were entitled to the return of the unearned premiums.

*United States Fire and Marine Ins. Co., vs. Tardy.*

—§ 167.

### WAGER POLICY.

§ 169. LIFE.—*Assignment of Policy to Creditor.*—Lewis, the husband of the appellee, being in bad health and indebted to Cammack, the appellant, in the sum of \$70.00, at his suggestion insured his life for \$3,000.00, under a seven years' policy. The policy was taken out by him under an agreement with the appellant that he should pay the premiums for the seven years, and that in consideration of the payments and his debt to the appel-

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\* Decision rendered June Term, 1872.

representations can never be converted into warranties otherwise than by being afterward written into the policy."

Campbell vs. New England Mutual Life Ins. Co., 98 Mass., 381.

*Higbie, Ex'r, vs. The Guardian Mutual Life Ins. Co.*

—§ 162.

§ 171. LIFE.—*Representation—Construction.*—*Held*, that "it is sufficient to avoid a policy that any one thing warranted is not true, and when the representation is a part of the contract, its truth, not its materiality, is in question."

Anderson vs. Fitzgerald, 4 H. of Lords Cases, 484.

"But a mere representation need only be substantially complied with, and in particulars material to the risk. It constitutes no part of the contract of insurance." *Held*, also, that "representations and statements made upon an application for insurance must be interpreted according to the fair and obvious import of the words."

*Higbie, Ex'r, vs. The Guardian Mutual Life Ins. Co.*

—§ 162.

"liabilities," the unpaid stock is clearly liable to *creditors* for all debts and liabilities.

*Held*, that the assignee can only collect so much of the unpaid stock as may be necessary to satisfy debts against the company, with costs and expenses, and that the necessity for the sixty per cent. assessment cannot be collaterally inquired into in actions brought to enforce payment of such assessment. Such questions must be decided in the Bankruptcy Court, and if more is assessed and collected than is necessary, any stockholder may apply to that court for his proportion of the surplus.

*Held*, that the original charter of the company contemplated that any increase of the capital stock beyond one million of dollars, should be assented to by the stockholders as distinguished from the directors.

*Held*, that the defendant's stock was not legal, and that no action could be maintained to recover the price of it, unless it became legal stock by matters occurring subsequently to its issue, or unless the defendant under the facts proved is estopped to set up this objection.

*Held*, that at a meeting of the stockholders of the original million of stock, duly convened, a majority might determine upon the increase of capital stock provided for in the original charter, and bind the minority.

After the directors had resolved to increase the capital stock, and the defendant had subscribed, at a regular annual meeting of the stockholders, including a majority of the original stockholders, a report was made showing that over three millions of stock had been issued. At this meeting the old and new stockholders voted for directors indiscriminately, and no objection to the increase of stock was then or ever afterward made. The proceeds of the sales of the stock was treated as capital by directors. Afterward the charter was amended so as to authorize the directors to increase the stock, and after this, as well as before, they recognized the validity of all stock issued. Three dividends were made upon all the stock, and the defendant received two of these dividends.

*Held*, that the requisite assent of the stockholders to the increase of the stock can be shown by their conduct and acquiescence, and need not necessarily be established by any formal vote or resolution.

*Held*, that after the company had openly for years done business on nearly \$5,000,000.00 of stock, and particularly after the directors under the amended charter had ratified the increase, the defendant will not be permitted, by the principles of law, in order to escape a liability imposed for the benefit of creditors, to deny, at this late day, that he is a stockholder in the company.

*Held*, that as the amount of stock contemplated by the original charter had never been reached, the amendment of the charter was not of such a radical character as to discharge a non-assenting stockholder from his liability as respects his unpaid stock.

FROST & DAVIS, *for Assignee.*

GILMAN, LAMPREY, HORN AND WARNER, *for Defendant.*

DILLON AND NELSON, JJ.

The questions arising in this cause have been presented by counsel with a degree of thoroughness, research and logical force rarely witnessed, and as an early determination of the cause is desirable, the court proceeds to announce its conclusions without waiting to find the time to elaborate, at any considerable length, the grounds on which the judgment rests.

3. It is our opinion that the original charter of the company contemplated that any increase of the capital stock beyond one million of dollars should be assented to by the stockholders as distinguished from the directors. It being admitted that the shares of stock owned by the defendant were no part of the \$1,000,000.00 first issued, but were part of the stock issued by it in excess of the \$1,000,000.00, and prior to the amended charter of March 25th, 1869, this stock would not be legal, and no action could be maintained to recover the price of it unless the stock has become legal stock by matters subsequently occurring, or unless the defendant under the facts proved is estopped to set up this objection. The legislature authorized a capital of \$5,000,000.00, but required the assent of the stockholders to any increase beyond one million. The amount issued at no time had reached the \$5,000,000.00.

No mode of procuring the assent of the stockholders to the increase of stock is prescribed by the charter. It is conceded that in a meeting of the stockholders of the original million of stock duly convened, a majority might determinate upon such increase and bind the minority. On January 9, 1868, the directors resolved upon an increase of the capital stock to five millions of dollars. On November 6, 1868, the defendant subscribed for his stock. On the 13th day of January, 1869, there was a regular annual meeting of the stockholders, to which a report was made, showing that \$3,746,100.00 of stock had up to that time been issued, and \$3,116,000.00 of stock was voted at that meeting for directors. The evidence shows that over \$800,900.00, or, in round numbers, four fifths of the first million of stockholders were present, in person or by proxy, and voted at this meeting for directors. No objection then, or ever, was made to the increase of stock, and the old stockholders and the new voted indiscriminately, and the proceeds of all sales of stock were treated and invested by the directors as capital until the company ceased to do business. Two dividends were made in 1869, and one in 1870, upon *all* the stock in each of those years exceeded four millions of dollars.

The defendant, in February, 1870, received two of these dividends. On the 25th March, 1869, the charter was amended authorizing, *inter alia*, the directors to increase the stock. After this, as well as before, the directors repeatedly and always recognized the validity of all the stock which had been issued.

The defendant, it may be admitted, had no personal knowledge of any increase of capital stock or of the passage of the amended char-

SUPREME COURT OF SOUTH CAROLINA,

APRIL TERM, 1873.

ELLA DONNALD ET AL., *Respondents*,  
vs.  
THE PIEDMONT AND ARLINGTON LIFE INS. CO.,  
*Appellant.\**

The policy provided that premiums should be paid annually on the fifth day of March; but thirty days of grace were allowed on condition that no premium should be received after the day named in the policy unless the insured should be in perfect health, and that the risk should continue at the entire option of the company. The policy also provided that no payment should be binding on the company unless acknowledged by a printed receipt, signed by the president, secretary, or actuary of the company.

*Held*, that the conditions annexed to a personal contract, like a policy of insurance, must be performed according to the terms used and the apparent interest of the parties, and are not satisfied by a performance *cy pres*. Every warranty in the policy is a condition precedent, and the assured must aver and prove performance of it.

*Held*, that the liability of the company depended upon the death of the assured during the continuance of the risk. The policy expired on the 5th of March, 1871, and the risk could be extended beyond that time only at the option of the company. The days of grace terminated on the 4th of April. Had the assured died on the third of April, and the amount of premium been tendered on that day, the company would not have been bound to accept it.

*Held*, that the deceased could not as agent of the company have given a binding renewal receipt to a third person under his own hand, and much less could he have renewed his own policy by a payment to himself. Ordered that the motion for nonsuit, refused by the court below, should prevail.

The deceased, on or about the 5th day of March, 1869, took from the appellant a policy upon his life for the sum of \$5,000.00, and paid the annual premium of \$68.75 thereon for the year ending March 5th, 1870. By the terms of the policy, thirty days of grace were allowed after the day named for the annual payments of the renewal premi-

\* Decision rendered April Term, 1873.

contention, it may be satisfactory to refer to the proposition submitted on the argument in behalf of the respondents, which claims the existence of the policy at the death of the assured, by reason of the alleged payment of the premium in his lifetime. There is a distinction between a tender and actual payment itself. The former may sometimes so operate as to place the party making it in a position in which he may be entitled to the full benefit of some condition, which was to avail, if within a certain time he made payment of the stipulated sum fixed by the agreement, but it cannot amount to full and complete satisfaction. Here the point relied on was not that payment of the required premium had been made, but that the intention of the assured, by enclosing the money in a package, its direction to the general agent of the company, and its presentation after his death by Herrick and Lake, amounted to a compliance with the stipulations, on the performance of which the interest in the policy was preserved to the respondents. This raised a question of law. The facts from which the legal conclusion was to be drawn were not contested, and presented a proposition purely for the judgment of the court.

To give, however, to the respondents the full benefit of the acts through which they contend the policy was saved to them, for the purpose of the argument we will consider what would have been the effect if the assured had been living, and claimed that his policy was still of force by virtue of the transactions which the respondents aver, he being dead, secure to them the benefit of the covenant? "The conditions annexed to a personal contract, like a policy of insurance, must be performed according to the terms used, and the apparent interest of the parties, and are not satisfied by a performance *cy pres*." 3 Steph. N. P. 2,072.

Every warranty in the policy is a condition precedent, and the assured must aver and prove performance of it.

It is held that a liberal construction must be given to such an instrument in seeking for the true intention of the parties, but if the terms leave no doubt of this, it must be enforced according to their plain meaning. The following extracts from the policy show so much of its conditions as is necessary for a proper understanding and decision of the case: "The company, in consideration of the first annual payment on the policy, continues the same in force from the fifth day of March, 1869, to the fifth day of March, 1870, and in consideration of the payment of the like sum in every twelve months as hereafter stated, and of the annual premium of eighty-six dollars and

vided the same should be from time to time paid within such space of 21 days, the policy should not be void, notwithstanding the happening before the expiration of such space of 21 days, of the event or events upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition, it was provided, "That if the premium should be unpaid for 21 days next after it should become due, the policy should be absolutely void." And it was further (fourthly) provided that in every case in which a new premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept such premium."

S. paid the premiums to the year 1855. On 22nd January, 1856, one of the premiums payable as in the policy mentioned became due. February 1st, 1856, he died from an accident which happened to him on the 27th January preceding. It was *held*, that there was nothing in the conditions to enable his executors to pay the premium after his death, and that if they had tendered it within the 21 days, the company would not have been bound to accept it. That the policy was, by reason of the non-payment of the premium within the terms of the policy and conditions, absolutely void, and that the company were not estopped from denying the payment. That neither the plaintiffs, (ex'ors,) nor the assured (had he been living) would have had an absolute right to keep the policy alive by payment or tender of the premium within the 21 days, the fourth condition giving the directors the option of refusing to continue it or not, at their pleasure. The principles which governed this decision had been applied in *Tarleton et al. vs. Stanforth et al.* 5 T. R., 695, to a case of insurance against loss by fire, and in *Want and Gaskoin vs. Blunt et al.*, 12 East., 183, to one arising out of a policy of life insurance. The reasoning in these cases leave nothing for further elucidation, and is conclusive on the points made here in behalf of the respondents. Nor can the verdict be sustained upon the presumption that the deceased was a recognized agent of the company, authorized to receive payment of premiums for others and therefore to be held invested with the same right as to himself, the exercise of which continued his policy. In the first place, the evidence contradicts the inference that he had paid the premium by charging it in his account with the company, for he proposed to send it to the general agent, not in satisfaction of money with which he was so charged, but "to pay premium," adding "if amount is not sufficient will arrange it when we meet," and the indorsement on the policy (made part of the contract) expressly for-

*Held*, that the fact that the furniture had depreciated in value from ordinary wear and tear, so that it was worth less than the amount for which it was insured in the last policy, did not vitiate the policy.

*Held*, that if the description of the building as a brick building was a warranty, it has not been proven untrue. In common parlance this was a "brick building," and we must give to the language that meaning which plain and unlettered men usually attach to it.

*Held*, that the appellant is responsible for the omissions of its agent, and cannot avoid liability by reason of any discrepancy between the facts as disclosed to him by the insured, and his presentation of them in the papers.

*Held*, that in order to work a forfeiture, under a provision in the policy of forfeiture in case of fraud, in the claim made for a loss, or false declaring and affirming in support thereof, the false statement must be willfully made with respect to a material matter, and with the purpose to deceive the insurer.

*Held*, that the rule given by some authorities that where the verdict finds the value of the property to be only one third or one half the valuation in the statement of loss the verdict should be set aside as itself evidencing fraud, cannot be law.

*Held*, that it is not sufficient to show that an improper question was asked a witness, unless it also appear that the answer thereto disclosed improper and illegal testimony, and to the prejudice of the party objecting.

*Held*, that the rule that the testimony of a deceased witness, given on a former trial of the same cause, may be proved as secondary evidence, does not apply to the case of a witness absent from the State.

*Held*, that it is not the right of counsel to require the court to repeat and reiterate the same proposition. It is sufficient if the whole series of instructions, when read in connection, correctly express the law.

*Held*, where an instruction was modified by passing through the words rejected one stroke of the pen, that if there was fear that the jury might be misled, the attention of the jury should have been called to the fact, and a specific exception taken in case of refusal to allow the instruction to be rewritten or the rejected word to be obliterated.

The appellant issued a policy to the insured upon his house, described as a brick building. At the time of the insurance, on account of the settling of the foundations, a portion of one of the walls had been removed and replaced by a temporary wooden substitute. One of the conditions of the contract—not a warranty—was that any misstatement in the description of the property should vitiate the policy. It was claimed that the court erred in refusing to instruct that the change was material, and in leaving it to the jury to find whether the condition of the building resulting from the change was material.

*Held*, that there was no error in the refusal of the instruction, and that in actions on policies of insurance a recovery may be prevented by proof of verbal misrepresentations, which, though undesigned, were material to the risk. In such case the burden of proof is on the defendant to show that the plaintiff made the representation, that it was material, and that it was untrue in substantial and material particulars.

*Held*, that in civil cases the point of exception must be particularly stated, and where the whole charge correctly states the law as requested, a party cannot assign for error any mere ambiguity in the instructions, or that they were calculated to mislead—no erroneous proposition of law being asserted—unless he ask an explanation of them to the jury at the time they are given.

**WILLIAMS & BIXLER, for Appellant.**

**MITCHELL & STONE, for Respondent.**

**GERBER, J.**

**This is an action on two policies of insurance, issued March, 1868.**



wrote a letter informing defendant that the foundation was settling and the walls weakened and crumbling, and that it was necessary to put in a temporary wooden wall. To the erection of this wooden wall, to remain only until the building could be repaired, the defendant consented, requesting to be informed how long it would take to complete the repairs, and stating that an additional premium would be charged if it took more than fifteen days. May 19th the plaintiff replied to this that he had completed the removal of the portion of the wall which he intended to remove, and was then erecting in its place a wooden wall ; that he could not say when the brick wall would be restored, as the foundation had been settling, and he preferred to let the wooden wall remain until the foundation became firm and secure, and to pay the additional risk required to allow the policies to cover the building in its changed condition. To this defendant agreed, and plaintiff continued to pay the additional risk until March, 1866, when the policies were renewed, the premium being fixed at  $2\frac{1}{2}$  per cent., to be reduced to the rate of  $1\frac{1}{2}$ , the same charged on the first policies issued, when the rear wall should be rebuilt of brick. In March, 1867, the policies were again renewed, without question as to the condition of the wall or building, at a premium of two per cent. In the summer of 1867 a portion of the south wall fell in and was replaced with wooden studding and boards. Up to March, 1868, the settling had continued, and the building had become considerably racked and the furniture had of course depreciated in value by time and use. What occurred when the policies sued on were issued is matter of dispute. Harvey testifies that he then knew nothing about the condition of the building except what the plaintiff then told him, and what he had learned from the correspondence and a diagram received from plaintiff in March, 1865, showing the alterations in the rear wall ; that plaintiff said nothing about the change in the south wall ; that when plaintiff applied to him for this last renewal, he, Harvey, said : " You have been paying a high rate. Have you put your building in proper repair ? " That plaintiff answered that he had, and Harvey then told him that he would reduce the rate to  $1\frac{1}{2}$  per cent. ; that nothing was said about the condition or value of the furniture ; that " according to the customs of the insurance business all houses having part of the walls wood are classed as wooden buildings, and not insured, if at all, under two per cent. ; " that he did not reduce the rate on account of competition, and did not tell plaintiff so. The plaintiff testified that he told Harvey of the change in the south wall, and that he told him the building was in good repair, and so consid-

In support of the specification that the plaintiff was guilty of concealment, it is urged that he failed to state the fact that owing to the condition of the furniture it was worth less than the sum for which it was insured, the fact of the unrepaired condition of the rear wall, and the generally "racked, cracked, and unsafe condition of the building." But the jury may well have found that there was no concealment. Harvey had seen the furniture and must have known that it had deteriorated in value by four years' wear and tear; and when he was told of the condition of the south wall he must have inferred that the settling had continued, and that the rear wall had never been rebuilt of brick. If he desired further information on these points it became his duty to ask for it when thus fairly put upon his guard. As to the value of the furniture, there is a plain conflict of testimony.

It is argued that the descriptions in the policies amount to a warranty; that they describe this as a "brick building;" that the warranty was broken as the walls were partly wood. We may in considering this point leave out of view the evidence of custom or usage relied upon by the appellant. The only testimony tending to establish the custom was the general remark of Harvey above quoted. There is nothing to show that such custom was so general or uniform, or of such notoriety or acceptance that the plaintiff can be presumed to have known of or to have contracted with reference to its existence. See also *Treadway vs. Sharon*, *ante*. We think the description was inserted not by way of warranty, but to identify the premises. If on the face of the writing there is room for construction or doubt, the benefit of the doubt must be given to the assured. It has been well said that such clauses in a policy should be so framed that he who runs can read; that as such contracts are often entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be so framed as to perplex courts and lawyers, and so that no prudent man can enter into one without an attorney at his elbow to tell him what the true construction of the document is. And if a warranty, it has not been proven untrue. In common parlance this was a "brick building," and we must give to the language that meaning which plain and unlettered men usually attach to it. But the verdict can be supported on another principle. In 1 *Smith's Leading Cases*, pp. 789-791, it is said: "The better opinion would seem to be that whenever the error of which the insurers seek to take advantage is occasioned by them, or by those for whom they are responsible, they will be equitably estopped from setting it up as a defense, whether it occur in a re-

the property to be only one third or one half the valuation in the statement of loss, the verdict should be set aside, as itself evidencing fraud, etc., in the statement. Here the verdict fixes the value of the furniture at \$3,000.00, but the statement gives it as \$6,000.00. But this cannot be law. The verdict is compounded of the varying estimates of twelve men, made on conflicting statements of witnesses ; it is often the result of a mere compromise of opinions ; it will stand though based upon evidence evenly balanced by evidence corroborating the statement. To hold it conclusive not only of an overestimate, but of a fraudulent overestimate, is altogether too arbitrary and harsh a rule, especially where the same findings as here negatives the existence of actual fraud, and the valuation in the statement is not positive, but is in terms—the expression of an opinion deduced from given facts. Of course there may be cases where the over-valuation is so glaring that the disproportion will amount to proof of fraud ; but it is every day's experience that honest men will honestly differ as to the value of such property as that here in question to a greater extent than this verdict differs from the statement.

The remaining assignments are of errors in law. The court allowed the witness, Ritter, to answer a question objected to by the defendant. But the statement fails to disclose what the answer was. So far as the record informs us, it may have been harmless. It is not sufficient to show that an improper question was asked a witness, unless it also appear that the answer thereto disclosed improper and illegal testimony, and to the prejudice of the party objecting. *Mays vs. Deaver*, 1 Clarke, (Iowa,) 222 ; 8 Iowa, 160 ; *Johnson vs. Jennings*, 10 Grattan, 1.

It appeared on the trial that this case was once before tried in the same court, judgment rendered and reversed on appeal. That on the former trial a Mrs. Reed was examined as a witness for defendant, and cross examined by plaintiff ; and that at the time of the second trial she was residing in the State of California. Defendant proved by plaintiff's counsel that the statement of the testimony of Mrs. Reed, as contained in the statement used in this court on the former appeal, was correct, and the substance of what she testified to on the former trial. It being conceded that such testimony was relevant and material, counsel for defendant asked leave to read to the jury a portion of said Reed's testimony from the transcripts thereof used on said first appeal, which portion is set forth in the record now before us. Plaintiff objected and the objection was sustained. All the cases agree that the testimony of a deceased witness given on a for-

must be called ; but because he is the witness agreed upon between the parties." The rule requiring proof by a subscribing witness has long been regarded as a useless formality adhered to only because courts had no power to dispense with settled rules of law ; but that requiring the production of the best evidence is one of substance and wise policy. The former is to be extended no further than strict precedent requires ; the latter is dispensed with only in case of necessity, and in the absence of precedent is to be applied to all cases falling within its reason. Even in Pennsylvania the analogy is not always followed. Thus they reject the testimony of a witness given on a former trial in case of supervening interest, which, however, they admit will enable the party to establish the execution of a document by proof of the handwriting of a subscribing witness. So, if the attesting witness has forgotten the facts or refuses to testify, this will let in proof by other witnesses. 1 Starkie, Ev., 510. But such forgetfulness or refusal is not a sufficient foundation for the introduction of testimony given on a former trial. 43 N. H., 297. If admissible, the whole of the testimony of Mrs. Reed should have been offered ; and it seems it should have been shown that Mr. Mitchell had forgotten what her testimony was. 48 N. H., 282 ; 17 N. Y., 138 ; 9 Rich, Eq., 429 ; 15 N. Y., 485 ; 22 N. Y., 462 ; 46 Barb., 410. Perhaps, too, the rejection of the transcript may be justified on the ground that it was not a memorandum made by the witness Mitchell, nor one made at or near the time when he heard Mrs. Reed testify. It is rested however on the first ground for the reason that it is claimed that the objection made by the plaintiff in the court below was so limited, and the argument on the point made by the appellant that he cannot take a different position in this court, has been altogether *ex parte*.

The first instruction given reads : "A." "It is not sufficient to aver that when the application for insurance was made the insured concealed a fact material to the risk, and which would have increased it if known. It must also appear that the insured knew of the existence of the fact. It is not every fact within the knowledge of the insured that he is bound to disclose, and if such facts as the law or the policy will require him to disclose are within the knowledge of the insurers, or so connected with the property insured that its knowledge may be fairly inferred, a failure to inform the company thereof will not avoid the policy." The defendant excepted generally to the giving of this instruction and each part thereof, and especially upon the ground "that so much of said instruction as held that it

Instruction "J" was properly refused, as taking from the jury the question, whether defendant waived the statement required by subdivision eleven.

There was no error in refusing to give instruction "K." It was to the effect that if the plaintiff, in procuring the policies, represented the building as a "brick building" in good order and repair, and if one fourth or more of the rear wall was composed entirely of wood unprotected by brick, then the building was not according to the true meaning of the term a "brick building," and the jury must find for defendant. The question whether the representations made by the insured are materially untrue, or untrue in some particular material to the risk, is a question of fact for the jury. Besides, there was no evidence that the plaintiff at the time of applying for these policies represented the building as a "brick building." The instruction was so framed that it might lead the jury to believe that they must find the plaintiff guilty of a fatal and material misrepresentation even if he informed defendant of the change in the south wall.

Instruction "L," requested by the defendant and refused by the court, is more objectionable in this respect than instruction "K." It reads: "L." "If the agents of defendant knew prior to the insurance of the policies sued on, that the brick wall, to the extent of the south half of the rear wall of said building, had been removed, and a wood wall had been substituted therefor, and they had not seen the building for some time prior thereto, and the jury believe from the evidence that at the time of procuring said policies the plaintiff told the agent of defendant, from whom he procured them, that he had put said building in perfect repair, then they must find for defendant, it being admitted that said wall remained in that condition at the time of the fire." This was properly rejected as liable to mislead the jury to the conclusion that they could not find, from the whole conversation as probably intended and understood by the parties, that Harvey was sufficiently informed of the true condition of the property—as excluding from the consideration of the jury the plaintiff's testimony that he told Harvey of the change in the south wall. 21 Md., 551; 27 Mo., 70; 20 Ill., 395.

Defendant rejected the instruction marked "M." viz: "If none of the defendant's agents, nor any person acting for defendant, had seen the building \* \* \* for several years prior to issuing the policies, and in issuing them defendant's agent relied entirely upon the plaintiff's representations as to the condition and state of repair of said building, and the jury believe the plaintiff then misrepresented the condi

100      Report of Decisions.      1001

resulting from the change was material. The questions raised by this assignment are not free from difficulty, but we think the ruling is sustained by principle and by the weight of authority. 18 N. Y., 170; 39 N. Y., 59; 6 Jones, (Law,) 352; 4 N. H., 381; 20 N. H., 557; 18 Ind., 361; 2 Parsons, Contr., 770. It is not contended that the answer here relied on was a warranty, nor is it denied that as a general rule the materiality of a representation is a question of fact to be submitted to and decided by the jury; but it is contended that the plaintiff, in answer to a specific question, represented the building to be in good repair; that the instruction was framed on the hypothesis that the change in the south wall was made and concealed; that the truth of this hypothesis is inconsistent with the truth of the representation; and that under the circumstances the materiality of the representation, and of the variance between the representation and the fact, was a question for the court and not for the jury, because the parties had made the representation material by asking the question to which it was an answer, and by inserting in the condition indorsed on the policy a provision that it should be vitiated by any misstatement as to the construction of the building or the materials composing it; and because there could be no dispute on the evidence whether the change in the wall increased the risk; that the court should have assumed that it would be thereby increased—wood being necessarily more combustible than brick and mortar.

It is undoubtedly competent for the parties to decide for themselves, and beforehand, what facts or representations shall be deemed material, and where they have so agreed the agreement precludes all inquiry upon the subject. This they may do by converting the representation into a warranty, or they can, by the form of the contract, stipulate as to its materiality without, however, putting it in other respects on the same footing as a warranty. Here they have not seen fit to make the answer a warranty, which could only be by making it in legal effect a part of the policy.

A warranty—like a covenant, fixing and liquidating the *quantum* of damage—will not be created nor extended by construction or implication. For like reasons the intention of the parties to conclude by convention the question of the materiality of the answer or representation should be clearly manifested; and in case of doubt the doubt is to be resolved in favor of the insured. So far as this contract has been reduced to writing, the intention to make the answer material depends solely upon the construction of the proviso concerning misstatements; and this, according to established rules, is either inopera-

question of fact for the jury to decide whether the variance between the representation and the existing facts was material—the very question which by this instruction as offered it was proposed to take away from the jury.

In *Peterson vs. Ellicott*, 9 Md., 60, the court says : “There is no principle better settled than that which denies to the court the right of assuming any fact when the *onus* of proving such fact rests upon the party asking the instruction, no matter how strong and convincing his proof on the subject may be. \* \* \* The instruction should contain *within itself* a correct legal principle—whenever it undertakes to set forth facts as the basis of a legal proposition, the facts referred to must be sufficient to warrant the instruction asked for without any extraneous aid.” The concealment of the change in the south wall, and the other facts set forth in this instruction, did not in and of themselves authorize a direction to find for the defendant ; and the contention of counsel is in effect, that the court below should have not only decided as matter of law that the parties had made the state of repair material, but should have assumed that the plaintiff had represented the building to be in good repair, and that it was not in good repair, because the parties meant by “putting the house in good repair,” “replacing the wood work with brick;” that this had not been done, and that such variance was material—that is, that it not only increased the risk but so increased it that, if known, it would have enhanced the premium or prevented the insurance. 20 N. H., 551; 8 B. Mon. 642; 30 Mo., 67.

The point now presented is not whether if these questions had been submitted to the jury, a finding contrary to the assumption requested would have been against the evidence or the weight of evidence. Nor is it necessary for us now to go so far as to say that none of these facts—for instance, the representation of good repair, a conceded fact in the case—could have been assumed in aid of the prayer. But it was not error to refuse to assume other of these facts. Harvey had insured the property for the same amount in 1867, when (the jury may have found) he had every reason to believe it was in substantially the same condition, so far as concerned the risk ; and though the rates were reduced in 1868, the jury may have attributed that to the competition then existing, as testified to by plaintiff. That counsel have correctly interpreted the meaning attached by the parties to the words “good repair,” is not self-evident nor undisputed. This was for the jury to ascertain in the first instance, not simply in view of the conversation in which the expres-

pliedly admitted the correctness of the assumption of fact upon which the point was made, and contended that there was no rule of law requiring the answer to be preserved in the bill of exceptions. The statement, however, shows that the whole value of the cornices testified to could not have exceeded the sum of fifty-eight dollars. Even if there was technical error in admitting the testimony, it would not warrant a reversal of the entire judgment; but in support of the judgment we feel justified in interpreting the statement, as showing that, in point of fact, Ritter testified with direct reference to the cornices he had seen in the house of the plaintiff.

III. The third suggestion is answered by the case cited in our opinion, which shows that the instruction did not submit to the jury the question of the knowledge of either the plaintiff or the defendant.

IV. It is now contended that the modification of instruction "M" was error because of the failure of the court to inform the jury that the concluding sentence was stricken out *for the reason* that it had already been given. Criminal cases decided in this State and California are cited to sustain this position. 1 Nev., 35. What was said on this subject in *People vs. Bonds* was wholly unnecessary to the decision. But admitting that such is the law in criminal cases, we think a different practice has always prevailed, and should prevail in the trial of civil causes. 36 Ill., 212; 36 Mo., 162; 14 Iowa, 370; 41 Penn., 242; 15 Texas, 400; 42 Maine, 564; 30 Miss., 120; 11 Md., 451; 8 Blackf., 98; 3 Dana, (Ky.), 36; 1 Black, (U. S.), 537.

In criminal cases no specific exceptions to the charge are required. In civil cases the point of the exception must be particularly stated; and where the whole charge correctly states the law as requested, a party cannot assign for error any mere ambiguity in the instructions, or that they were calculated to mislead—no erroneous proposition of law being asserted—unless he ask an explanation of them to the jury at the time they are given. 35 Ala., 653; 23 Ill., 380; 23 How. (U. S.), 189; 20 Texas, 226; 28 Ala., 641; 10 Ind., 90; 9 Ala., 63; 19 N. H., 377; 5 Met., (Mass.), 151; 19 Pick, 311.

Counsel ask "how could we object to a particular mode of modification of which we were wholly ignorant?" It seems to us that nothing could be easier than to have made the specific objection in this case. They knew that the concluding sentence was not given as part of this particular instruction. They knew that this sentence had been given in another instruction. They therefore knew that there was a good reason for striking it out, and they knew that this



health indicated by the report of the company's medical examiner, and verified by him on trial, was inconsistent with the functional derangement of the brain claimed by the company to have existed at the time of making the application.

*Held*, that persons of ordinary understanding are competent to form an opinion whether one whom they have opportunity to observe appears to be sick or well at the time.

*Held*, that medical men of skill and experience are not necessarily restricted to their own observation, but may give an opinion based upon facts proved by others, or upon hypothetical cases when pertinent to the issue, and when evidence has been given tending to prove the facts assumed.

*Held*, that the report of medical examiner, based in part upon answers given by the assured to questions asked by the examiner, constituted no part of the application for insurance.

*Held*, that it is sufficient to avoid a policy, that any one thing warranted is not true, and when the representation is a part of the contract, its truth, not its materiality, is in question, but that a mere representation constitutes no part of the contract, and need only be substantially complied with, and in particulars material to the risk.

*Held*, that verbal representations can never be converted into warranties, otherwise than by being afterwards written into the policy.

*Held*, that the materiality to the risk of a fact concealed or misrepresented, in the absence of fraud, is one of the elements, and controlling in determining the effect of such concealment or misrepresentation upon the contract.

*Held*, that a fraudulent representation in respect to a fact not material to the risk, if in the judgment of the insurer it be material, in respect to his inducements to undertake the risk, will avoid the policy.

*Held*, that representations and statements made in an application for insurance must be interpreted according to the fair and obvious import of the words.

This is an appeal from a judgment rendered by the General Term of the Supreme Court of the Fourth Judicial Department, upon a verdict in favor of the plaintiff, given by a jury at the Monroe Circuit.

The action was commenced in October, 1870, to recover the amount of a policy of insurance issued by the defendant upon the life of George Mulliner. He died on April 20th, 1870, leaving a will. The plaintiff was duly appointed executor, and as such brought this action. The complaint avers that the insured did not violate any of the conditions or stipulations of the policy, but fully kept and fulfilled the same.

The answer puts in issue this allegation, and alleges among other things, that on December 20, 1869, Mulliner applied to defendant for a policy of insurance upon his life, and then made certain representations which were warranties, upon the faith of which the policy was issued, and which by its terms became a part of it, and which, if they were in any respect untrue, rendered the policy void.

The policy contained the provision, that "if the representations made in the application for the policy, and upon the faith of which

It is true that in another part of the answer it is averred that the insured represented that neither of his parents had been affected with mental derangement, whereas he well knew his mother had been affected with mental derangement. But there was no such representation proved. The declaration in the application that comes nearest such a representation is in answer to the question, "Have any of your uncles, aunts, or grandparents had consumption, insanity, or any other hereditary affections? If so, what?" and the answer was, "Not that applicant ever heard of." Specific questions had been put and answered as to the father and mother of the applicant, and this general question did not include them, and if it did, the statement was only as to the knowledge of the applicant. As an item of evidence tending to prove the insanity of the applicant, it was not within the issue. It was not averred in the answer, or attempted to be proved upon the trial that the insured was ever deranged, or that his brain was diseased or functionally disordered. There was no proof or attempt to prove that the headaches of the insured were inherited, or were at all connected with the mental condition of the mother, or the source and cause of her mental unsoundness, if she was unsound of mind.

If it be conceded that the question was competent, and that the answer of the witness would have proved that the mother was hopelessly insane at the period referred to, it could not have influenced the result. That would not have proved that the son was necessarily insane, or that the functions of his brain were not healthy. A parent may have an inheritable disease, and yet the child not inherit it; and it was not averred or attempted to be proved that the son had inherited, or had in any form the disease with which the mother was said to have been afflicted. The evidence was properly excluded as immaterial, and the propriety of the question to a non-expert need not therefore be considered.

Dr. Duran was competent as an expert to state as to matters pertaining to his profession, and his opinion could not have been excluded on the ground of want of skill in his profession or knowledge of diseases. *Bierce vs. Stocking*, 11 Gray 174. Another condition was, however, wanting to make the proposed testimony of the witness competent, viz., knowledge by the witness of the facts necessary to enable him to give an opinion in the particular case. Science and skill, without a knowledge of the facts essential to a correct application of them, are of no value to an expert as a witness. To make the opinion of a medical gentleman, as to the character and nature of the

tionable. The physical condition and state of health of the assured at the time of the application was directly in issue, and any evidence tending to show that he was then in sound health, and a proper subject of insurance, was competent. *Rawle vs. Am. Mut. Life Ins. Co.*, supra. All persons of ordinary understanding are competent to form an opinion, whether one whom they have opportunity to observe appears to be sick or well at the time. 1 Greenl. Ev. § 440, a.

Medical men of skill and experience are not necessarily restricted to their own observation, but may give an opinion based upon facts proved by others, or upon hypothetical cases, when pertinent to the issue, and evidence has been given tending to prove the facts assumed.

The defendant asked the judge to charge the jury that the statements of the assured made to Dr. Mandeville, if untrue, whether intentionally false or not, would vitiate the policy. Dr. Mandeville was the medical examiner in behalf of the defendant, and the statements referred to were made by the assured in answer to questions put by the examiner, and upon which in part he based his report to the company. The report of the examiner constituted no part of the application for insurance. That was signed by the applicant, and by a clause in the written policy it was provided that if the representations made in the application should be found in any respect untrue the policy should be null and void. The statements in the application were in the nature of warranties, and if untrue in fact, the policy would have been avoided.

It is sufficient to avoid a policy that any one thing warranted is not true, and where the representation is a part of the contract, its truth, not its materiality, is in question. *Anderson vs. Fitzgerald*, 4 H. of Lords Cases, 484. But a mere representation need only be substantially complied with, and in particulars material to the risk. It constitutes no part of the contract of insurance. The representations were verbal, and it is said in *Campbell vs. N. E. Mut. Life Ins. Co.*, 98 Mass., 381, "that verbal representations can never be converted into warranties, otherwise than by being afterward written into the policy."

The questions put by, and answered to Dr. Mandeville, were not written in or referred to in the policy, or made material by it. The materiality to the risk of a fact concealed or misrepresented in the absence of fraud, is one of the elements, and controlling in determining the effect of such concealment or misrepresentation upon the contract. *Seaman vs. Fonnereau*, 2 Strange, 1,183 ; *Moses vs. Del. Ins*

There was no evidence tending to show any derangement of the functions of the brain, or muscular and nervous systems. There was no evidence that the recurrence of the periodical attacks of headache had an origin or cause indicating any permanent disease, or that they, or their cause, might shorten the life of the subject, or that the fact of their existence was at all material to the risk. There was no question for the jury upon this branch of the case, and upon the issue tendered upon this statement and representation of the insured, and therefore the alleged error of the judge, if error was committed in the submission of a question to the jury upon this representation, could work no injury to the defendant, and must be disregarded.

There being no evidence that the representation as made was untrue in fact, or that the functions of the brain, and nervous and muscular systems, were not in a healthy state, it is not necessary to consider whether, if the representations had been untrue, the policy would have been vitiated without proof that they were fraudulently made. The judge charged that the policy would not be vitiated, although the representations were not strictly true, if the applicant answered the question truthfully as he understood it, and as he knew his own case and the peculiarities of his own case. We do not pass upon the exception to this particular ruling, for the reason that there was no evidence of the untruthfulness of the representation as made and reported to the defendant. This disposes of all the objections to the recovery and judgment taken in this court.

The judgment must be affirmed.

Held, that it is sufficient to put an end to the policy that there has been a change in the title, and no one can say that a conveyance of the fee and substituting the interest of a mortgagee in the insured, is not a substantial change in the title. Judgment rendered and a new trial granted.

Appeals from judgments of the General Term of the Supreme Court in the Third Judicial Department, affirming judgments of the Special Term in favor of the plaintiff.

These actions were brought on two policies of insurance for \$1,000 each, on a grist mill and machinery. The policies were issued to the "heirs and representatives of Andrew Kirk, deceased," and each contained the following provision, viz.: "If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company indorsed thereon, the policy shall be void." The original plaintiff was Marilla Kirk, executrix of the last will and testament of said Andrew Kirk, deceased, under which she was authorized, as executrix, to insure, sell and convey his property. In February, 1870, after the policies were issued, Marilla Kirk, as said executrix, sold the grist mill to Henry O. Arnold, without obtaining the consent of the insurance companies and without notice to them, and did not assign the policies of insurance.

The grist mill was sold for \$8,000.00 in cash, Arnold giving a mortgage back for \$7,000.00, which mortgage is still unpaid. Arnold was in possession of the mill, and occupied it before purchasing, and when the policy was given, under a lease from Marilla Kirk, the executrix, and continued in possession after the purchase, and at the time of the fire by which the mill was destroyed; and there was no change with regard to the possession or use and occupancy of the mill from the time of making the insurance. August 1, 1870, the said mill was destroyed by fire, and due notice, accompanied with proper proof of loss, was given to the companies.

Marilla Kirk resigned her office August 29, 1871, and the plaintiff was duly appointed trustee and administrator, with the will annexed, and as such was substituted as plaintiff herein.

The action was tried at a Circuit Court of the Supreme Court, held in Albany, N. Y., January 30, 1872, before Hon. Wm. L. Learned, Justice, without a jury, and plaintiff was adjudged to recover in each case the full amount claimed.

SAMUEL HAND, *for Appellants.*

JOHN GOULD, *for Respondents.*

are, valid policies in favor of the plaintiff, as testamentary trustee of the real estate of the deceased, in whom the title to the premises insured was vested at the time of the insurance. He held the title in trust for the heirs of the decedent, and is entitled to the benefit of the policy in trust for the beneficiaries under the will, although he is not specifically named. *Clinton vs. Hope Ins. Co.*, 45 N. Y., 454;\* *Herkimer vs. Rice*, 27, ib., 163.

Each of the insurances was upon the condition, expressed in the body of the policy, that "if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, etc., then, and in every such case, this policy shall be void."

The word "property" was used here for the corpus of the thing insured, as distinguished from the interest of the insured in it, the thing owned, and which was capable of being sold or transferred, and of which possession could be had. The word was used as it is in the division of property into real or personal, to indicate the thing itself, and not the estate or interest in it. In other policies other expressions, widely different from this, have been held to mean simply the insurable interest in the property or thing insured. As in *Hitchcock vs. N. W. Ins. Co.*, 26 N. Y., 68, the policy was to become void "in case of transfer or termination of the interest of the assured in the property insured," and it was held that so long as an insurable interest remained, the policy was not avoided. An insurable interest may exist independent of the title to the property, and as in that case the property may be sold, but an insurable interest covered by the policy may remain.

That case was decided upon the peculiar phraseology of the condition. The conditions before us are broader, and intended to provide against a transfer of title or change in the title or possession, irrespective of any insurable interest that might arise or remain upon the change of title. In other cases cited the conditions of the policies have differed somewhat in words from that in *Hitchcock's* case, but were in substance the same, and in none of the cases upon which the respondent relies did the condition make void the policy upon a sale or transfer of the property itself.

The condition found in these policies has been held, whenever it has come before the courts, to prohibit the sale or transfer of the property, and a change of title has been held to work an avoidance of the policy. It is by no means a forfeiture or penalty, or in the nature of

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\* 1 Ins. Law Jour'l, 436.

perform the condition of the mortgage, and the latter could at any time discharge the lien by paying the mortgage debt.

While the interests of the owner in fee and the mortgagee are both insurable, and each may have independent insurances, each covering his own interest, the interests are entirely distinct, and the rights and obligations of the parties to the contract different. Had the plaintiff been insured as mortgagee, the insurer, upon payment of a loss, would be entitled to be subrogated to the rights of the mortgagee against the mortgagor. The distinction between an issue based on a denial of an insurable interest, and the question whether there had been an alienation or change of title was recognized in *Orrell vs. Hampden F. Ins. Co.*, 13 Gray, 431. A change of title, valid as between the parties, was treated as a breach of the condition, but there no alienation was proved. A mortgage is not an alienation of the property mortgaged, but when the condition of the policy was that "all alienations and alterations in the ownership, etc.," of the property should make void the policy, a mortgage was held to be an alteration of the ownership, and to make void the insurance. *Edwards vs. Mut. Safety F. Ins. Co.*, 1 Allen, 311. The court thought it material to the insurers to know who had title to or interest in the property insured.

The question was directly before this court in *Springfield F. and M. Ins. Co. vs. Allen*, 43 N. Y., 389,\* and it was there held without dissent, following the current of authority and giving the policy a fair and reasonable interpretation, that the policy providing it should be void upon "any change of title in the property insured," it became void by a transfer of the premises by the owner, although the interest of the assured, a mortgagee, was not changed subsequent to the date of the policy. Where the insurance was to the owner of the property, loss, if any, payable to a mortgagee with a similar condition as in this case, an alienation of the property by the mortgagor was adjudged to make void the policy. *Grosvenor vs. Atlantic F. Ins. Co.*, of Brooklyn, 17 N. Y., 391. The condition is not capable of two readings, and the courts have no right, under the pretense of interpretation, to nullify a material provision inserted for the reasonable protection of the insurers, and thus exercise a dispensing power in favor of the insured. It cannot be said that a conveyance of the fee and the taking back a mortgage for the purchase money, is not as well a sale and transfer as a change of title.

It is sufficient to put an end to the policy that there has been a

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\* 1 *Ins. Law Jour.* 7, 87.

was liable under policies issued to him. He was also one of the original subscribers to the capital stock of the company, and a part only of the amount subscribed had been paid. For the remainder he had given his promissory notes, which were unpaid at the time of the decree in bankruptcy. The plaintiff was also at the time of the fire the treasurer of the company, and had a large amount of the company's funds in his hands.

*Held*, that if the amount due from the plaintiff to the company for his subscription to the stock was an ordinary debt, he would have the right to set off against it his losses under the policies.

*Held*, that the charter of the company permits him to retain a part of the company's capital, and hold it in trust for the creditors, and that to allow him, when the company is insolvent and bankrupt, to pay himself for his losses under the policies out of this capital, would enable him to take advantage of his fiduciary relations to obtain a preference over other creditors.

*Held*, that before a set off would be admissible as between the company and its treasurer in case of the insolvency or bankruptcy of the company, there must be satisfactory evidence that he, as to the money in his possession, had taken the position of an outside party, and that the set-off is not maintainable unless there is established the simple relation of debtor and creditor. Claim for the set-off overruled.

GEO. W. SMITH AND SAMUEL W. FULLER, *for Complainant*.  
WILLIAMS & THOMPSON, *for Assignee*.

DRUMMOND, J.

This was a bill in equity to claim a set-off against certain demands of the assignee of the company. The debt sought to be set off arose as follows : At the time of the fire in Chicago, on the 8th and 9th of October, 1871, the plaintiff held several policies of insurance against the company, as indemnity for loss by fire. He sustained loss to a large amount, which, it is conceded, was within the terms of the policies, and for which the company is liable. This, and other losses at the same time, rendered the company insolvent, and it was shortly after put into bankruptcy by its creditors. The assignee, while admitting the liability of the company, denied that the debt could be set off against the demands of the company, and filed a cross bill asking for a decree against the plaintiff for these demands. They were two, and the first arose as follows : The charter of the company authorized the subscribers to the stock to pay a small percentage of their subscriptions in money, and to give notes with real or personal security for the remainder, and declared that when \$50,000.00 of the capital stock was subscribed, and five per cent. paid, and the remainder secured, business could be commenced. The plaintiff was one of the original subscribers for a considerable amount of the stock, and paid in one installment, and gave promissory notes to the company, secured as required, for the remainder.



his losses under policies of the company against his subscription to the stock. In one sense, what the plaintiff owes the company on his stock is a debt due the company. What the company owes the plaintiff on his policies of insurance is a debt due the plaintiff. The debts are mutual, in that they exist from one to the other reciprocally. And if the debt due from the plaintiff were an ordinary debt, then, as we have already decided in the case of *Drake vs. Rollo*, assignee, the set-off would be allowed, although the result would be to pay the plaintiff his claim against the company in preference to other creditors. We are to apply the bankrupt law to the law of the State creating the corporation. The charter authorized the company to commence business on the payment of five per cent. of the amount subscribed, provided the payment of the remainder of the stock was secured.

The purpose of this was to accommodate the stockholders, by permitting secured promises to pay to stand in the place of the money. It was still intended as a fund to protect the creditors of the company, and the charter pointed out the special manner in which the fund could be made available in case of necessity, and which has been followed in this case. So long as the company was solvent there might not be any serious objection to the stockholder insisting that his loss on a policy should be an answer to a call to pay his subscription to the stock, because if he were to pay his subscription, the company would be obliged immediately to refund to the extent of the loss. In that case no one is injured by the allowance of the set-off. But where the company is insolvent and bankrupt, it is different. Some one must sustain a loss, and the question is whether the stockholder who has not paid his stock subscription, and who happens to have a policy on which the company is liable, shall bear his share of the loss, or shall be paid in full the extent of his subscription. Does the fact of insolvency or bankruptcy make no change in the rule? We think it does, and that there is a difference in principle between the two cases. We have the right to judge of causes from their effects, and to reason accordingly, and certainly we ought not to sanction a rule which produces so much loss to the general creditors of the company, unless by following a different course we trench upon some settled principles of law or equity. Where a party borrows from the capital of the company, takes out a policy, sustains a loss, and in case of insolvency and bankruptcy claims to set it off, we admit it, because he is an ordinary debtor of the company, and therefore comes within the rule that one debt answers another, however hard it may occasionally be, and doubtful on general principles of ethics. But in this case the

says, it is his opinion that there would be a set-off under a particular section of the statute.

The other case is *In re Universal Banking Corporation*, 5 Law Reports (Chancery Appeal Cases), 492, 1869-'70—and is similar to the first and relies upon it.

So far as these cases show that a subscriber to the stock of a company may set off a demand due from the company against his subscription, under the circumstances set forth, there may be certain analogies between those cases and this, though the debts are treated throughout as ordinary debts, and no consideration seems to have been given to any relation of trust existing between the parties. And besides, as already intimated, there are various statutes referred to, which may have more or less affected the views of the court. The winding-up act seems to concede that the principle of set-off, in case of contribution, is wrong, as it prohibits it.

These cases were both decided after the passage of our bankrupt law, and therefore could not have entered into the consideration of the law-maker. But there are some decisions in this country which do not agree with the principle of those late English cases.

It seems to be admitted by the counsel of the plaintiff, that in the case of mutual companies, so-called, the rule did not apply of allowing set-off. One case may be referred to—*Lawrence vs. Nelson*, 21 New York R., 158—where the party had given what is termed a "premium note," and had sustained a loss—one a debt due him from the company, the other by him to the company, and he sought to set off his claim on the policy against his premium note, and the court held that this could not be done in that case, because the note constituted a part of the capital of the company, and in case of insolvency to suffer it to be done would be giving one creditor an unfair advantage over another.

The bankrupt in this case was called a mutual company, though technically a stock company, but we are somewhat at a loss to understand the alleged difference between the two cases; it is true we can call one a joint stock company and the other a mutual company, but names do not change things. In both the "bills payable" constitute a part of the capital of the company, and a trust fund for the benefit of creditors. In both the party owing the bills receivable has met with a loss on a policy of the company. The difference, if any, seems to be in favor of the premium note as claiming a set-off, because that is given for the policy, and by a species of arrangement stands indirectly as a part of the capital whereas here the bills receivable have

an ordinary policy-holder, and he would occupy a vantage ground over others.

There are several difficulties in the way of a set-off on the special facts of the case. The plaintiff was elected treasurer in 1870. Whatever arrangement was made, if at all, was prior to that time. The most that can be said is that after he was elected treasurer, the funds in his hands, while they were, from time to time, reported as cash or capital, drew interest, which was accounted for, and this with the acquiescence of those who may be presumed to represent the company. There was no distinct contract made with him while he was treasurer which would constitute him the debtor, and nothing more, of the company.

The plaintiff was not only the banker of the company, but its treasurer, considered as sustaining those relations to the company pertaining to the office. It is very clear that whatever may have been the view of the plaintiff, the directors and the company did not regard the plaintiff as the mere borrower of the funds in his hands, and before a set-off would be admissible as between the company and its treasurer in case of the insolvency or bankruptcy of the former, there ought to be satisfactory evidence that he, as to the money, had taken the position of an outside party; in other words, that he had, as to the money, ceased to be the treasurer of the company.

We need not refer to the question, whether if it was a loan to the treasurer by the directors, it was a violation of law, and therefore invalid. We prefer to place it on the ground that under some of the conceded facts of the case the set-off is not maintainable, unless there is established the simple relation of debtor and creditor. This, we think, has not been done, and therefore we overrule the claim of set-off.

The original bill will be dismissed, and a decree will be rendered for the assignee on the cross-bill for the amount due.

The plaintiffs were insured by the defendant on merchandise, hazardous and not hazardous, contained in brick store, No. 360 Pearl Street, in the city of New York. The insurance was in fact effected upon the plaintiffs' stock of tobacco and snuff, in the building named, which they held under a lease containing a provision that the premises were not to be used or occupied for any business deemed extra hazardous by insurance companies, on account of fire. The plaintiffs manufactured tobacco in New Jersey, had their place of business in Water Street, New York, and occupied a part of the premises in Pearl Street for the purpose of storing manufactured tobacco and snuff. At the time the policies were issued, the plaintiffs were the lessees of the entire building, which seems to have been one of five stories, and they at some time occupied the third floor and the basement, but at the time of the fire were only occupying the basement with their stock of tobacco. In April, 1863, while the policies were in force, the plaintiff permitted Saurin & Osgood to come in and occupy the first, second, fourth and fifth floors of the building in their business, and they were in such occupation when the fire occurred, and it happened from the explosion of some combustible material they necessarily employed. Saurin & Osgood manufactured chairs, or partially did so, in Gardner, Massachusetts. The business which they introduced into No. 360 Pearl Street was the finishing of chairs, which had been manufactured in the rough at their factory in Massachusetts, were shipped in an incomplete state in boxes, and when they reached 360 Pearl Street, New York, the boxes were opened, the shavings in which they had been packed were scattered around loosely, and the fragmentary parts of chairs were in various forms fitted together, and made perfect for sale. In the performance of this work, from eight to ten men were constantly employed, with various tools and implements, and among other necessary things, glue, paint, alcohol, varnish, and benzine, requiring four or five barrels at a time. In the ordinary course of the business in which Saurin & Osgood were engaged, the alcohol lamp, used for heating glue, with which different parts of a chair were put together, exploded, and the fire ensued in consequence.

The contract of insurance provided that "if the premises at any time during the period shall be used for the purpose of carrying on therein any trade or occupation, or for keeping therein any articles denominated hazardous or especially hazardous, in the second class

therefore, that a stock of "cabinet ware" was covered by the terms of the policy, I am not able to discover anything in the contract of insurance that permitted the plaintiffs to allow Saurin & Osgood to occupy any part of the premises for purposes such as the evidence disclosed. It appears to be very clear that in the first class of hazards no process of manufacture or completion of any article therein named was contemplated. It obviously has reference to the mere keeping or storage of the article named in a finished state. If otherwise, the subsequent restrictions of the policy against various trades, and their incidents, and the presence of combustible materials are of no significance.

It must be admitted that there is of necessity a large difference in the risk of insuring against fire any article completed and finished, stored in any building, and the same article in an unfinished state, while undergoing in various forms the process of completion. In the one case the thing might appear very harmless, and in the other it might be quite different; and it seems that in the policy we have to consider, the distinction is very apparent, and presents no question for a jury. I do not agree that it is to be sent to a jury to say whether or not a lot of disjointed chairs, in an unfinished and incomplete state, is a stock of "cabinet ware" in the sense in which those terms are employed in the policy. They plainly were not, and the defendant was entitled to judgment. *Pindar vs. The Continental Ins. Co.*, 38 N. Y., 364; *Lee vs. Howard Ins. Co.*, 3 Tray, 592; *Macomber vs. same*, 7 id., 257; *Whitmarsh vs. Charter Oak Ins. Co.*, 2 Allen, 581; *Richards vs. The Protective Ins. Co.*, 30 Maine, 373.

It is presumed that the evidence offered by the defendant to show that the risk was increased by the use to which Saurin & Osgood devoted the premises, was ruled out upon the principle that the trade of "chair finishing" meant a stock of "cabinet ware," and that therefore the additional risks incidental to the keeping of a stock of cabinet ware were agreed to be borne by the insured. I am by no means clear that in any view of the case this evidence should not have been received; but as I prefer to dispose of the case upon the other ground, it is not necessary to discuss that question.

The judgment must be reversed and a new trial granted, with costs to abide the event.

since a former insurance upon it, when its value had been stated at the same amount as in the present policy. It was claimed that the agent of the defendant knew of all the facts in regard to the property, at the time the application was made. The decision of the court covers many other points raised in regard to practice, construction, evidence, the effect of false statements, etc.

The case of *Higbie, Ex'r, vs. The Guardian Mutual Life Ins. Co.*, decided in the Court of Appeals of New York, involved questions relating to medical experts and their testimony, and to representation and warranty. The court lays down the doctrines applying to these subjects, and especially to verbal and fraudulent representations.

The case of *Savage, Trustee, etc. vs. The Howard Ins. Co.*, and the same plaintiff against *The Long Island Ins. Co.*, were heard together in the Court of Appeals of New York. The policies were issued on a grist mill, and the main defense on the part of the companies was under a provision of the policies, that if the property should be sold or transferred, or if any change should take place in the title or possession, without the consent of the companies, the policies should be void. The court, reversing the judgment of the court below, held that a sale of the property, with a mortgage upon the property to secure the purchase money, amounted to a change of title and avoided the policies. The court also laid down the principles of construction applying to policies of insurance, and defined the insurable interest of trustees.

In *Scammon vs. Kimball, assignee of The Mutual Security Company*, which became insolvent on account of losses at the great Chicago fire, the plaintiff demanded that the amount due him for losses covered by policies, should be set off in satisfaction of claims against him for unpaid subscriptions to the capital stock of the company, and for amounts due from him as treasurer of the company. The United States Circuit Court held that these claims against the plaintiff should go to satisfy the claims of all the creditors of the company, and denied the set-off.

In *Appleby vs. The Astor Fire Ins. Co.*, heard in the Commission of Appeals of New York, the respondents, manufacturers of tobacco and snuff, were insured on premises used for storage of manufactured tobacco. Subsequent to the insurance, a portion of the premises was let for the purpose of chair-finishing, and from the materials used in this business the fire occurred. Judgment was entered against the insurance company in the Supreme Court, but it was reversed and a new trial granted by the Commission of Appeals.

ness their ignorant crudities, careless or forgetful of the fact that they may be imperilling the life of an innocent being."

And not only are such physicians sworn, but their opinions usually have as much weight with the jury as those of the most skillful specialist; indeed, we may safely say even greater weight, as the former are generally selected from the immediate locality, and are known either personally or by reputation to the jurors.

But the ordinary physician is, after all, not the most dangerous witness in cases of alleged poisoning. The toxicologist is the main witness, on whose skill, and knowledge, and integrity depends the issue of life and death. There is, therefore, no excuse or palliation for ignorance or blundering on his part, such as was exhibited by Professor Aiken, of the University of Maryland, in the recent cases of Dr. Schoeppe and of Mrs. Wharton. Dr. Wood speaks of him with righteous indignation, and details his gross mistakes with a caustic pen. Schoeppe, it will be remembered, was a young German physician, practicing in Carlisle, Pa. He became engaged to be married to a Miss Stennecke, a wealthy maiden of sixty years of age. In January, 1869, Miss Stennecke feeling unwell, Dr. Schoeppe was called, and gave her an emetic. In the afternoon she was weak, but apparently not ill. In the evening she became worse and very drowsy. She was put to bed, and was not seen again until the next morning, when she was found comatose, "with contracted pupils, irregular respiration, and complete muscular relaxation." Late in the afternoon she died. Afterward, a will being found in favor of Dr. Schoeppe, he was charged with having poisoned her, and her body was exhumed and subjected to a post mortem, which, "for culpable carelessness and inexcusable omissions, stands unrivaled." Professor Aiken made a chemical examination of the stomach, and reported the finding of prussic acid, and testified at the trial that the deceased had received a fatal dose of that poison. Backed by an apothecary and the village doctor, the evidence of Aiken led to a verdict of "guilty;" although Dr. Wormley, who had made toxicology a life-long study, stoutly protested that it was impossible that Miss Stennecke could have been killed by prussic acid, because that poison does its work in a few minutes, while she had lived nearly twenty-four hours after the alleged poisoning. Dr. Schoeppe was condemned to death. So soon as the evidence got before the public, the analysis of Aiken and the evidence of the medical experts was "condemned by the united voice of all the scientific world," and at last, after a protracted confinement, and after the condemned man

of hospital steward at Washington to that of professor of chemistry in a small institution at Baltimore." His analysis proved to be even more defective than that of Professor Aiken. It is worthy of note that there were in Baltimore several chemists of conceded ability in toxicology, and of unquestioned integrity, and the wonder is that, if the prosecution really did believe that the deceased had been poisoned, and were not afraid of the truth, they did not at least allow the presence of these gentlemen at the analysis. Judge Pierce, afterward writing of this trial, said: "I do not know of any case in the annals of criminal jurisprudence which, from the evidence submitted in the case, had so baseless a foundation for so grave a charge."

On the trial of Mrs. Wharton for an attempt to poison Van Ness, we have not the space, nor is it necessary, to speak. The medical evidence for the prosecution was from the same persons who figured in her first trial, and was quite as faulty and insufficient. We may express the hope, however, that that will be the last case in which Professor Aiken will take so prominent a part. His career has been sufficiently extended. Dr. Wood relates the following:

"Some little time since, upon the chemical evidence of Professor Aiken, a poor colored woman was hung in Anne Arundel County, Maryland. She died protesting her innocence, and the general impression appears to be now that she did not commit the crime. A prominent member of the Maryland bar told me recently of a case tried in that State, in which the accused, as he stated, certainly did kill the deceased with arsenic, yet in which, by showing the insufficiency of Professor Aiken's analysis of the stomach, he obtained the acquittal of the prisoner."

The career of this Maryland professor may prove useful in calling public attention to the defects in our system, or rather want of system, of securing medical expert evidence, and may lead to speedy and radical reform. Bad cases sometimes lead to good law, and this case is one of the very worst character. But what change is advisable?

Dr. Wood refers to a suggestion made in the American Medical Association, that in cases of poisoning the court appoint a commission to collect the scientific evidence, and adds that while this at first sight seems practical, there is danger of the court appointing just such men as Professor Aiken. The system adopted in Prussia, though apparently complicated, is probably the best in use, and one which has given to Prussia "the best corps of experts the world has ever seen, as well as the most eminent individual medical jurists." There the



of government, the public naturally looked to men trained to the bar, to supply the requisite qualifications as leaders and guides in perfecting the great experiment in which the country was involved. In this way, for many years after the affairs of the government and its general policy had become settled, a kind of prestige attached to the name and profession of a lawyer, often indeed but indifferently sustained, which gave them a consequence within the localities in which they were scattered through the country, which continued rather by force of tradition than any special learning or capacity which they possessed as individuals. The doctor, the minister, and the lawyer of the village were the organs and oracles of the village opinion, and the lawyer was content with an income of a few hundred dollars a year, because it enabled him to live as comfortably as his neighbors, while he was superior to most of them in the respect paid to his judgment and opinion.

In such a state of things legal education was a secondary matter. Any man would have the mechanical trade of a lawyer by two or three years' work in an office, drawing writs and deeds from forms, collecting debts and reading his law out of his statutes, or picking up at the sessions of the courts, hints and data from the judge and leading counsel, and the rest was taken for granted by the people, who did not trouble themselves to question the capacity of whomsoever had been admitted to the bar. In the mean time, a few at every bar became, from choice as well as a kind of necessity, expert managers of cases, and able and often studious and learned jurists and advocates. The higher courts were graced and dignified by wise and upright judges holding their place by an independent tenure, and the prestige of the profession was sustained by the respect and admiration which its leaders won for it.

But in process of time a marked and permanent change came over the country and the bar. Education, especially of the colleges, became more widely diffused. It was no longer limited to the professions. As party politics succeeded to statesmanship, and noisy partisanship took the place of tried patriotism and sound judgment, public office came to be sought for as a source of profit and the means of livelihood. In such a state of things, money became more and more the chief end for which men labored, since it was made the test and measure of a man's social position, influencing and controlling politics through the press and the caucus, and giving consequence to men who without it were of no account in the community. There was a reason, therefore, why it became an object with young men to gain

office business. Instead of any of our schools requiring too much elementary training, our belief is that, regarded as a means of bringing up and sustaining the profession where it used to stand, in the front rank of liberal callings, there must be a new departure in the training which is to fit young men for admission to it, corresponding, in some measure, to the advance made in educating students in our technical schools and institutes of science. In another article we hope to explain some of the points wherein we are behind in what should be the subjects taught, and the purposes aimed at, in the instruction of these schools.

It is enough for the present that we protest against degrading the profession to a mere money-making business. Let the rich shoemaker build and enjoy the best houses in the village ; let the manufacturer of patent pills manipulate county caucuses, and John Morrissey play the game of politics till he wins a seat in Congress ; but let the profession still have a right to boast that it has, as of old, a class whose ambition is above mere outside show and the honors which fawning and flattery can win ; and who, standing in the foremost rank of culture and civilization, are able to guide the public mind in the great political inquiries of the day, to help solve the moral problems upon which the progress of the race depends, and at the same time to act as the safe counselors and fearless advocates in upholding the cause of private justice, and thereby to inspire new confidence in all men in the protection which the law holds over them.

But while we would have the aims and purposes of the profession of this high order, it is not to be concealed that to attain them requires something more than generous motives and good intentions. The lawyer who is to make himself felt at the bar, must have an early and thorough preparation for it. He must start on the right course, and pursue it with all the aids of vigorous training and all the light of careful experience. He must, in other words, be educated for the work, and thus be prepared to grapple with and overcome the difficulties which lie in his way to success. There is no royal road to the learning of the law any more than of any other department of human knowledge, and therefore it is that we are the more encouraged to offer, in another article, a few familiar suggestions bearing upon that most interesting question, *what* a student should study, as well as *why* he should study it?

EMORY WASHBURN.

CAMBRIDGE.

hours to put up the necessary stock. A net valuation, he alleged, had been made of the company's liabilities, showing a deficiency of \$148,850, but by a gross valuation there would have been at least a surplus of \$300,000; also that Superintendent King acted not from his own judgment, but on the advice of Augustus F. Harvey, Macbeth, and Peck, who had declared their intention to make money out of the Atlas.

The petition also alleged that the St. Louis Mutual refused to accept the policies of the Atlas, and compelled the policy-holders to change them for others of an inferior quality and different conditions.

The latest news respecting this company gives the result of an examination into its affairs by a committee of experts.

St. Louis, Oct. 26, 1873.

At a meeting of the board of directors of the St. Louis Mutual Life Insurance Company last night, the report on the condition of the affairs of that company up to October 1, which has just been prepared by Edwin W. Bryant, actuary of the Life Association of America, Emory McClintock, actuary of the Northwestern Life, of Milwaukee, and J. H. Kellogg, actuary of the Insurance Department of the State of Illinois, was presented and adopted.

This report gives the total assets of the company at \$5,948,989; total liabilities and reserves, at four and a half per cent., \$6,360,279. Excess of liabilities on this basis, \$411,289.

There is, however, an excess of assets over the liabilities, and a six per cent. reserve of \$741,753, and as the company is allowed to do business in some States on the six per cent. reserve, it is claimed and asserted by the board that the company is perfectly solvent. The suits against the company by W. Selby, late State Superintendent of Insurance, have been laid over by Judge Madill, of the Circuit Court, till General Blair, successor to William Selby, has been qualified and installed in office, when the case can be taken up on motion.

## MICHIGAN INSURANCE REPORT, 1873.

*Fire.*—The Third Annual Insurance Report of the State of Michigan, gives a summary of the fire insurance business done in that State during the previous year. Referring to the Boston fire, which took place on the 9th and 10th of November, the 82 companies doing business in Michigan paid for losses \$20,172,324.10. The total amount of property destroyed by the fire was estimated at \$80,000,000, upon which there was \$56,000,000 insurance, and of this the amount paid was \$38,000,000.

The number of mutual fire companies in the State is 31; policy holders 39,273; aggregate risks, \$75,503,263.56; amount paid for losses in 1872, \$104,096.56; unpaid losses, \$37,601.86; assessments made, \$140,719.09. In these mutual companies, which are quite popular with the farming class on account of the cheapness of insurance, the average expense to the insured was a little over two mill; on a dollar at risk. By the Michigan stock companies in the State, the amount of fire and inland risks written was \$19,036,892; premiums received, \$275,326.94; losses incurred, \$132,930.40. The amount of risks written by companies of other States and foreign governments in Michigan was \$139,267,863.41; premiums received, \$1,933,408.06; losses incurred, \$1,202,477.51.

The Commissioner finds that the companies of other States obtained, after deducting 3½ per cent. of the premiums received for expenses and taxes, a balance in four of \$94,114.73, on a net profit of 5.69 per cent. on the premiums. A similar examination of the business of the ten foreign companies shows a net loss of 2.72 per cent. on the premiums received. During the year an average of more than sixty per cent. of the entire premiums received were absorbed in the payment of losses reputed as incurred.

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"Third, that the findings of such board shall be published, and fully set forth the condition of the company.

"Fourth, that the policy-holders shall be entitled to the reserve on their policies according to the legal standard, or, if a deficiency exists, to a ratable proportion of the assets.

"Fifth, that a majority of the policy-holders, personally or by proxy, at a called meeting, shall choose trustees for the purpose of settling the affairs of the company; said trustees being at all times subject to the commission of insurance."

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#### A BUILDING DEPARTMENT.

The New York Fire Marshal makes the following recommendation on the subject of building: "I cannot now or ever perhaps too often or too strenuously urge the importance of an efficient and comprehensive building law, as clear, full, and precise in detail as architectural experience can make it, with its requirements enforced by a commission of skilled architects and builders, whose decisions should be final. Superintendent, deputies, and inspectors should be required to pass a rigid examination as to qualifications by a competent body of architects. Such departments are in successful operation in London, Paris, and other cities of Europe, and there is nothing in the most minute detail of their most stringent law that is not the result of experience in the school of misfortune, or that could be wisely omitted in regulating the erection of a modern city."

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#### LIFE OFFICES AND THE ASHANTEE WAR.

We think the probable expense of the Ashantee campaign has been somewhat overrated by the daily journals. They have failed to remember that about two thirds of the officers employed may fall victims to the climate, and as under such circumstances the sums of money

they have paid for their commissions will be pocketed by the country, there will be a nice little windfall for the Exchequer. At any rate, the insurance companies are not disposed to take a favorable view of matters. Even during the Abyssinian campaign officers proceeding on service were called upon to pay, in some instances, as much as 30 per cent., one of the best offices charging 8. In the case of those who have volunteered for Ashantee, all policies are, it is said, to be considered cancelled. Under the circumstances, it surely is the duty of the War Office to make some special provision. The least that can be done is to guarantee the commission money, in case of death, to the families of those who do duty during the war.—*Army and Navy Gazette*.

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#### FAILURE OF THE NATIONAL LIFE INSURANCE CO., OF NEW YORK.

On the 25th of October, Mr. Joseph Wilds, of Brooklyn, petitioned Judge Fancher, of the Supreme Court of New York, to have a receiver appointed for the National Life Insurance Company of New York. The petition was based upon the report of the Superintendent of Insurance, Hon. Orlow W. Chapman, that the result of his examination of the company showed that its total liabilities exceeded its admitted assets by \$169,412. The judge, after hearing the petition, appointed Mr. Eli Beard, the late president of the company and one of its largest stockholders, receiver, and he was ordered to file bonds to the amount of \$100,000. By Mr. Chapman's report of his examination, the total admitted assets were \$514,213; items not admitted as assets, \$200,047, including \$72,357 premium notes in excess of reserve, and total liabilities, \$713,626.

phans' Court, there was no such alienation before confirmation as avoided the policy, and the loss having occurred between the sale and the confirmation, the legal title was then in the hands of Forney, and the action on the policy was rightly brought in the name of the administrator to the use of the vendee.

*Insurance Co. vs. Updegraff*, 9 Harris, 518; *Reid vs. Lukens*, 8 Wright, 200; *Hill vs. Cumberland Valley Mut. Protection Co.*, 9 P. F. Smith, 474. *Held*, that the vendee had sufficient interest to entitle him to give notice to the company. His personal representative, succeeding to his legal right as covenanted, is a trustee for the heirs or the vendee, and either the trustee or *cestuy que trust* sufficiently represents the party for that purpose.

*Farmers' Mutual Insurance Co. vs. Forney, adm'r.\**

Rep'd Jour'l p. 828.

PENNA. S. C.

### CONSIDERATION.

§ 173. *LIFE.—Premium Full Consideration for Insurance.—Held*, that the risk which is run by the company is a *full*, meritorious and solid consideration for the premiums already received.

*Wells vs. Smith*, 2 ed., V. C. Rep., 78; 7 Paige, 22; *Crippin vs. Hermance*, 9 Paige, 211; *Benedict vs. Lynch*, 1 Johns. Ch., 370; 1 Sim. & Stu., 598, note 2; *Wiswall vs. McGruan*, 1 Hoff. Ch., 139; *Gates vs. Geen*, 4 Paige, 355; *Hazephel vs. Baker*, 18 Vesey, 116.

*Tait et al. vs. New York Life Ins. Co.*

See Ins. Law Jour'l, 363.

U. S. C. C.

### CONTRACT OF INSURANCE.

§ 174. *LIFE.—Contract of Insurance discharged by War.—Held*, that a contract is discharged, the performance of which becomes illegal by matter subsequent, is applicable to policies of insurance.

*Woods vs. Wilder*, 43 N. Y., 167; *Furtado vs. Rodgers*, 3 B. & P., 191; *Brewster vs. Kitchell*, 1 Salk, 198; *Suthers vs. Com. Ins. Co.*, 2 Bush., 298, 2 Parsons on Cont., 674; *Presbyterian Church vs. N. Y.*, 5 Cow., 538; *Bennett vs. Woolfolk*, 15 Geo., 213, 1 Parsons, Adm'ty and Shipping, 329; *Gray vs. Simms*, 3 Wash. C. C., 276; *Oldin vs. Insurance Co.*, of Penn., 2nd ibid., 321, 322; *Hanger vs. Abbott*, 9 Wall., 532, 90 Eng. C. Law, 7 62S. C.; *Exposito vs. Burden*, 7 Ellis & Black, 2 B., 763; *Bliss on*

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\* Decision rendered July 2nd, 1873.

## EVIDENCE.

§ 176. FIRE.—*Absent Witness.*—*Held*, that the rule that the testimony of a deceased witness given on a former trial of the same cause may be proved as secondary evidence, does not apply to the case of a witness absent from the State.

17 Ill., 427; 5 Rand., (Va.), 708; 14 Mass., 234; 2 Blackford, (Ind.), 308; 4 S. & R., 204; 1 Nott & McCord, 409.

*Gerhauser vs. North British and Mer. Ins. Co.*

—§ 175.

§ 177. FIRE.—*Opinion of Witnesses.*—*Held*, that the evidence of witnesses whether the keeping of fireworks was a part of the regular business of German jobbers and importers, being a matter of opinion, could not be received, the material point being whether this class of persons really did keep fireworks for sale.

1 Phillips on Ins., § 2112; 1 Greenleaf on Evidence, § 440.

*Steinbach vs. Lafayette F. Ins. Co.\**

Rep'd Jour'l p. 815.

N. Y. Com. A.

## FIREWORKS.

§ 178. FIRE.—*Fire-crackers and Fireworks—Hazardous Articles.*—The store and stock of fancy goods, toys, etc., of a German jobber and importer was insured against fire, and special provision to keep fire-crackers for sale was written in the policy. The keeping of other goods of a hazardous or extra hazardous nature forfeited the policy. The respondent kept fireworks for sale, and the fire was caused by their accidental ignition. *Held*, that the fact that fire-crackers were specially provided for in the policy affords a very strong presumption against the keeping of fireworks unless included in the written words "in the line of the business." *Held*, that if any hazardous or extra hazardous article enters into and forms a part of the line of business of the insured, then such article is specially provided for in the policy. *Held*, that the insurers are bound to know the nature

\* Decision rendered June Term, 1873.

might claim the whole amount, provided it did not exceed the sum insured. To remedy this the directors passed a resolution that only three fourths of any actual loss should be paid. *Held*, that in the agreement that "in case any loss should occur to our respective properties by fire, we will only claim and receive three fourths of the amount of the actual loss, provided three fourths of the amount as aforesaid does not amount to more than three fourths of the sum insured," the insertion of the proviso was unwarranted by the resolutions, and is not limited in case of a total loss to three fourths of the amount insured. The agreement was not to apply when three fourths of the actual loss should exceed three fourths of the sum insured, and in case of a total loss the insured is entitled to receive the whole amount of his insurance, which is three fourths of the actual cash value, and is not limited to three fourths of the amount of the policy.

*Farmers' Mutual Ins. Co. vs. Forney, adm'r.*

—§ 172.

## MANUFACTURES.

§ 181. FIRE.—*Process of Manufacture*.—The respondents occupied a part of the premises for storage purposes under a lease, containing a provision against the use of the building for extra hazardous purposes. A part of the premises were subsequently leased for the purpose of finishing chairs, for which various inflammable substances were used, and the fire was occasioned by the use of an alcohol lamp in this business. *Held*, that in the first class of hazards, no process of manufacture or completion of any article was contemplated, and that it had reference to articles in a finished state. *Held*, that there was an important difference between the risk of insuring against fire any article completed and finished, and the same article undergoing the process of completion.

*Pindar vs. The Continental Ins. Co. of N. Y.*, 364; *Lee vs. Howard Ins. Co.*, 3 Troy, 592; *Macomber vs. the same*, 7 ib., 257; *Whitmarsh vs. Charter Oak Ins. Co.*, 2 Allen, 581; *Richards vs. The Protection Ins. Co.*, 30 Maine, 373.

*Appleby et al. vs. Astor Fire Ins. Co.\**

*Rep'd Jour'l* p. 733.

N. Y. C. A.

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\* Decision rendered June Term, 1873.

The days of grace terminated on the 4th of April. Had the assured died on the 3rd of April, and the amount of premiums been tendered on that day, the company would not have been bound to have received it. *Held*, also, that the deceased could not, as agent of the company, have given a binding renewal receipt to a third person under his own hand, and much less could he have renewed his own policy by a payment to himself.

*Donnald et al. vs. The Piedmont and Arlington Life Ins. Co.\**

Rep'd Jour'l p. 788.

S. C. S. C.

§ 183. LIFE.—*Payment on the Day agreed is a Condition Precedent.*—*Held*, that the payment of the premium on the day agreed is a condition precedent, and that the policy became void for the non-performance of these conditions. *Held*, also, that impossibility of performance, growing out of unanticipated exigencies, constitutes no exception to its operation.

Bliss on Life Insurance, pp. 253-274 ; Roberts vs. N. E. Mut. Ins. Co., 1 Disney, 385; Bergson vs. Builders Ins. Co., 38 Cal., 541; Norton vs. Insurance Co., 36 Conn.; Sheridan vs. Phoenix Ins. Co., 8 House of Lords, 745 ; Catoir vs. American Life Ins. Co., 4 Vroom, N. J., 487; Want vs. Blunt, 12 East., 183.

*Held*, that the incidents of the war, which rendered the payment of premiums difficult or impossible, did not constitute an excuse for which subsequent tender authorizes a recovery. *Held*, also, that there is a difference between protecting a defendant from an action for damages, and authorizing him to recover against another, where in like circumstances he has failed to perform a condition precedent on which his right of action depended, and that this distinction is increased where the condition is optional and the damages are dependent upon some act to be performed at the election of the plaintiff, as the payment of premiums on a life policy. *Held*, also, that no degree of hardship will satisfy the rule that the act of God rendering the performance impossible is a defense, and in no case is impossibility an excuse if it refer solely to the personal disability of the promisor, there being no natural impossibility in the thing.

2 Parsons on Cont., 672; *ibid.*, 459 ; Thompson vs. Dudley, 25 N. Y., (11 Smith,) 272 ; School District vs. Daneby, 25 Conn., 530 ; Trustees vs.

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\* Decision rendered April Term, 1873.



Bennett, 3 Dutcher, (N. J.,) 514 ; Adams vs. Nichols, 19 Pick., wort vs. Jones, 2 Wall, 1 ; Bullock vs. Demmit, 6 T. R., 650 ; Co. vs. Pritchard, *ibid.*, 750 ; Beebe vs. Johnson, 19 Wendell, vs. Thompson, 3 B. & P., 420 ; Chitty on Cont., 734 ; 8 T. R., on Carriers, 294 ; 3 Burrows, 1637 ; 4 Wheat., 204 ; Co. Lit Shep. Touch, 164 ; Harmony vs. Brigham, 12 N. Y., 99 ; Oakle turn, 11 N. Y., 25.

*Tait et al. vs. New York Life Ins. Co.*

#### PREMIUM RATES.

§ 184. FIRE.—*Premium Rates no Criterion of Risk*—that the rate of premium has no bearing on the kind the sole question being whether, having insured the business, fireworks were not covered as a part of it.

*Steinbach vs. Lafayette F. Ins. Co.*

#### PUBLIC ENEMIES.

§ 185. LIFE.—*Contract of Insurance abrogated by War*—policy of life insurance was issued some years before and the premiums paid to 1862, when the agency in the United States ceased by reason of the war. A tender was made in due time to the former agent, of all sums due before the death of the insured, which was in that year. The tender was refused and the officers of the company had no knowledge of the tender until after the death of the insured that the contract of insurance was abrogated the moment the insured and insurer became public enemies ; that it was impossible to keep the policy in force without constant communication between the lines, and that it would be of great injustice to the loyal members of the company to trust the collection of premiums to a public enemy. *Held*, in case of ordinary debts the obligation is full before but on a policy of insurance a new value is created by the acts of public enemies. *Held*, that a policy of insurance in force on the life or property of a public enemy is not capital in his hands.

*Tait et al. vs. New York Life Ins. Co.*

## RELIEF.

§ 186. **LIFE.**—*Dependent on Performance of Conditions.*—*Held*, that in this case all idea of relief from a penalty to secure payment of the premium is totally excluded, where an affirmative right to relief is claimed, and no obligation existed to perform the conditions, i. e., the payment of premiums, upon which alone the contract accorded such right.

*Robert vs. New Eng. Life Ins. Co.*, 1 Disney, 355; *Easton vs. Canal Co.*, 13 Ohio, 79; *Eagan vs. Mutual Ins. Co.*, of Albany, 5 Denio, 326; *Beadle vs. Chenango County Ins. Co.*, 3 Hill, 161; *Jennings vs. ibid.*, 2 Denio, 75; *Davis vs. Thomas*, 1 Russ & Myl., 506.

*Held*, that the agreements in this case are said to be unilateral, the company having no power to force their continuance, and this is conclusive against relief.

*Tait et al. vs. New York Life Ins. Co.*

—§ 173.

## REPRESENTATION.

§ 187. **FIRE.**—*Representations and Warranty—Material to Risk*—*Held*, that the contracting parties can decide for themselves, and beforehand, what facts and representations shall be deemed material. This they may do by converting the representations into a warranty, or they can agree as to its materiality without putting it on the same footing as a warranty. *Held*, that a warranty, like a covenant, fixing and liquidating the quantum of damages, will not be created nor extended by construction or implication. For like reasons the intention of the parties as to the materiality of the answer or representation should be clearly manifested, and in case of doubt is to be resolved in favor of the insured. *Held*, that in actions on policies of insurance a recovery may be presented by proof of verbal representations, which, though undesigned, are material to the risk.

*Gerhauser vs. North British and Mer. Ins. Co.*

—§ 175.

## STOCKHOLDER'S NOTE.

§ 188. **FIRE.**—*Treasurer—Set-off—Bankruptcy.*—The company became insolvent on account of losses at the great Chicago

tract where the subject varies in value, or the interests of the plaintiff are subject to change. There are many circumstances which may produce an abandonment of the policy, and this contingency must materially affect its interpretation, and the standing in a court of equity of those who seek a recovery where premiums have not been paid.

Mutual Benefit Life Ins. Co. vs. Reese, 1 Bigelow R., 83; Howell vs. Knickerbocker Life Ins. Co., 3 Rob., 232; Robert vs. New England Mut. Life Ins. Co., 1 Bigelow R., 634; Catoir vs. Am. Life Ins. Co., 4 Crom., N. J., 487; O'Reilly vs. Mut. Life Ins. Co., of N. Y., Superior Court, Nov. 22, 1868; Koelgis vs. Guardian Mut. Life Ins. Co., 2 Lansing, 480.

*Tait et al. vs. New York Life Ins. Co.*

—§ 173.

## TITLE.

§ 190. FIRE.—*Change of—Construction of Policy—Contract of Insurance.*—The policy contained a provision that “if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company indorsed thereon, the policy shall be void.” The property was sold for \$8,000, the purchaser giving a mortgage back for \$7,000, which was unpaid at the time of the loss. *Held*, that “contracts of insurance are construed so as to give effect to the intent of the parties as indicated by the language employed. They do not in any respect differ from other written instruments, but are interpreted by the same rules, and one cardinal rule of interpretation requires that words and phrases in contracts, as well as in statutes and other written instruments, shall be taken in their ordinary popular sense, unless they appear to have been used in a different sense.”

Springfield F. and M. Ins. Co. vs. Allen, 43 N. Y. 389.\*

*Held*, also, that “the insurers and insured may agree upon the terms of the contract and make its validity or continuance depend upon any terms and conditions, lawful in themselves, which they may deem reasonable or proper, and whether reasonable or unreasonable, is for them, not for the courts, to determine.”

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\* 1 Ins. Law Jour'l, 57.

*Held*, also, that "the word 'property' was used here for the corpus of the thing insured as distinguished from the interest of the insured in it—the thing owned, and which was capable of being sold or transferred, and of which possession could be had. The word was used as it is in the division of property into real and personal, to indicate the thing itself and not the estate or interest in it." *Held*, also, that "it cannot be said that a conveyance of the fee and the taking back a mortgage for the purchase money is not as well a sale and transfer as a change of title. It is sufficient to put an end to the policy that there has been a change in the title, and no one can say that a conveyance of the fee and substituting the interest of a mortgagee in the insured is not a substantial change in the title."

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*Tittlemore vs. Vermont Mut. F. Ins. Co.*, 20 Vt., 546; *Abbott vs. Hampden Mut. F. Ins. Co.*, 30 Me., 414; *Orrell vs. Hampden F. Ins. Co.*, 13 Gray, 431; *Springfield F. and M. Ins. Co. vs. Allen*, 43 N. Y., 389;\* *Edwards vs. Mutual Safety F. Ins. Co.*, 1 Allen, 311.

*Savage, trustee, etc., vs. The Howard Ins. Co.*

—§ 190.

#### WAR.

§ 192. *LIFE.—Effects of War on Executory Contracts.*—*Held* that the opinion of Kent, Chancellor, in *Griswold vs. Washington*, 16 Johns., 438, that all agreements made during war, and the continued execution of those which are executory, made before, are unlawful, is hereby reaffirmed, and that this principle is directly applicable to the abrogation of an agency for the making, renewal, or continued execution of contracts, and all sharing of or guaranteeing against loss.

Grotius, Lib. iii., ch. 22; Puffendorf, Lib. viii., ch. 7, § 14; Vattel, b. 3, c. 16, § 264; Le Guidon, ch. 2, § 5; Cleirac, p. 197; Ex parte Boussmaker, 13 Vesey, 71; Brown vs. United States, 8 Cranch, 110; The Julia, 8 Cranch, 181; Schofield vs. Eichelberger, 7 Peters, 586; The William Bayley, 5 Wallace, 377; Cappell vs. Hall, 7 Wall., 542; U. S. vs. Lane, 8 Wall., 185; McKee vs. U. S., 8 Wall., 163; U. S. vs. Grossmayer, 9 Wallace, 72; 1 Duer on Ins., pp. 415, 418.

*Tait et al. vs. New York Life Ins. Co.*

—§ 173.

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\* 1 Ins. Law Jour'l, p. 57.

of the business is a sufficient provision for all the articles belonging to it, even though some of the articles are hazardous or extra hazardous.

*Held*, that the evidence of witnesses whether the keeping of fireworks was a part of the regular business of German importers and jobbers, being a matter of opinion, could not be received; the material point being whether, in fact, the persons known in the trade under this designation did keep fireworks.

*Held*, that the rate of premium paid had no bearing on the question whether fireworks were intended to be insured; the sole question being whether, having insured the plaintiff's business, fireworks were not covered as a part of it.

This was an appeal from a judgment of the General Term of the Supreme Court of the Second Judicial Department, affirming a judgment in favor of the plaintiff, entered upon the verdict at Circuit.

The facts, as far as material, are stated in the opinion of Reynolds, C.

A. R. DYETT, *for Respondents.*

P. S. CROOKE, *for Appellant.*

REYNOLDS, COM.

The plaintiff was insured for one year against fire on his stock of fancy goods, toys, and other articles in his line of business, in his store in the city of Baltimore, in his occupancy as a German jobber and importer, and he was privileged to keep fire-crackers on sale. It was provided in the policy that if the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein articles, goods, or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the second class of hazards annexed to the policy, except as therein specially provided for, or thereafter agreed to by the defendant, in writing upon the policy, then so long as the same shall be so used, the policy was to be of no effect. The policy of insurance was accepted by the plaintiff, with the condition last referred to, and the privilege to keep "fire-crackers on sale" was specially written in the policy, and added 10 cents more of premium to the \$100. "Fireworks" are classed as "specially hazardous," and added 50 cents or more per \$100 to the rate of insurance, and it is claimed that to be covered by the insurance must have been specially written in the policy, which in this case was not done.

The rule which prevails in the interpretation of contracts of insurance is, or should be, the same as in all other written contracts, of whatever nature. The intent is to be ascertained and observed, and if it clearly appears by the writing, the contract must have effect according to its terms. In this case, without evidence *aliunde*, it would

The judge's charge in this case was not excepted to, nor was there any motion for a nonsuit. The questions for review are presented by exceptions to the rulings in the admission or rejection of evidence, and upon requests to charge presented by the defendants; but no question was presented as to the non-liability of the defendants for any particular part of the loss, if they were liable at all, upon the policy. Under the condition in the policy suspending its operation so long as the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein any articles, goods or merchandise denominated hazardous or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to the policy, except as therein specially provided for, or thereafter agreed to by the corporation in writing upon the policy, it is the settled law of this State that any such article is specially provided for if it, as matter of fact, enters into and forms a part of the kind or line of business specified in the written part of the policy in the description of the risk assumed. The insurers being bound to know the nature and kind of articles belonging to the business and occupations against the risks of which they undertake to insure, the specification of the business is a sufficient special provision for all the articles belonging to it under the condition in the policy, even though some of those articles belong to the second class of hazards mentioned in the condition. *Harper vs. Albany M. Ins. Co.*, 17 N. Y., 194; *Harper vs. New York City Ins. Co.*, 22 N. Y., 441.

The defendant's exceptions to the question by the plaintiff, whether fireworks are usually kept in Baltimore by persons in the same line of business as the plaintiff, and his exception to the exclusion of various questions put by him, whether fireworks are a part of the line of business of German jobbers and importers, dealing in toys, fancy goods, etc.; whether when they are kept by German jobbers and importers dealing in fancy goods, they are in or out of their line of business, present the principal questions of evidence involved.

The plaintiff sought to show what was the fact in respect to keeping fireworks in Baltimore by dealers in the same line of business with him, while the defendant's question involved the element of opinion on the part of the witnesses as to the propriety of considering fireworks as forming part of the line of German jobbers and importers.

That was of no sort of consequence, the material point being whether in fact the persons known in trade under the designation

here. The New York cases do not seem to have been adverted to, nor the case itself much considered. We should not be justified, under these circumstances, in abandoning a settled line of decision in our own State, in order to confirm it.

Judgment affirmed.

All concur. Lott, Ch. C., not sitting.

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## COURT OF APPEALS OF NEW YORK.

*Appeal from the June Term, 1873.*

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THE NATIONAL LIFE INS. CO. OF THE UNITED  
STATES OF AMERICA, *Appellant*,

vs.

PHILIP MINCK, ADM'R OF ANNA C. MINCK,  
DECEASED, *Respondent*.\*

Defendant procured a policy on the life of his wife. At the time she was insured she was suffering from a cancer on the breast, from which she shortly afterward died. The loss was paid by the plaintiffs before it was fully aware of her condition when insured. The plaintiffs brought an action to recover the amount of the policy and damages in the court below, and were nonsuited.

*Held*, that to enable the case to go to the jury, it is sufficient to establish the fact that the policy was procured by fraud, and this may be done by direct or circumstantial evidence.

*Held*, that if the husband procured the policy on the life of his wife by fraudulent means, she cannot retain the benefit of it, and he be relieved of the fraud by which it was obtained. And he occupies the position of claiming to keep money, as her representative, which he procured as her agent.

*Held*, that if the medical examiner of the plaintiff, the husband, and the insured, knew that the latter had an incurable disease, and acted in concert in procuring the policy, the plaintiff is entitled to recover. If a person colludes with an agent to cheat the principal, the latter is not responsible for his knowledge as agent.

*Held*, that in the absence of any fraud in procuring a policy, or of fraudulent representations made to procure the money, the time for insisting upon the breach of any warranty contained in the original application, is when the claim is made for the execution of the contract.

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\* Decision rendered June 10th, 1873.

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The application contained the questions, whether she had had any serious illness, local disease or personal injury, and whether she had then, to the best of her knowledge or belief, any disorder, or any infirmity or weakness, tending to impair her constitution, to all of which the answer was in the negative. There was evidence tending to show that she had at the time a cancer in her breast, which she was aware of, and of which she afterward died.

There was conflicting evidence as to the fact of a cancer, and also as to whether the deceased knew it, which should have been submitted to the jury. The fact that she signed the application, that she was examined by Dr. Potter, for the purpose of making the medical certificate, her constant communication with her husband, who, with the doctor, was active in making the application and procuring the policy, and other circumstances, were pertinent to go to the jury upon the question of her knowledge of the general fact that any insurance was being effected upon her life, and also of the substance of the application which she had signed. It is true there was evidence tending to show that the application was not in fact read over to her, and that she did not know what it contained; but her ignorance of its nature was far from being conclusively proved.

Again, if the husband, as the agent of the wife, procured the policy by fraud, she cannot retain the benefit of it and be relieved from the consequences of the fraudulent means by which it was obtained.

It is established that an innocent principal cannot take an advantage resulting from the fraud of an agent, without rendering himself civilly liable to the injured party. 10 N. Y., 345; *Graves vs. Spier*, 58 Barb., 349, affirmed in this court. 25 N. Y., 600; 26 N. Y., 509; 28 N. Y., 390. If the husband obtained the policy by a fraud, acting as the agent of his wife, he occupies the position of claiming to keep money as her legal representative, which he fraudulently obtained as her agent. He is defending this action upon her title to the policy, which, if procured by his fraud, is invalid. The court also erred in refusing to allow the plaintiff to go to the jury upon the question, and to charge them that if, from the evidence, they believed it was known by the husband, Dr. Potter, and the deceased, that she had a cancer which was incurable, and that there was an understanding between them that they were to obtain an insurance upon her life, at the time knowing she was incurably diseased, the plaintiff was entitled to recover. The defendant was a laborer in a saw-mill. This insurance and another were procured upon the life of his wife, at the suggestion of his employer, whose wife was the certifying friend. The



in the original application, was when the claim was made for the execution of the contract. Mere ignorance of a fact which might have enabled the company to defend an action upon the policy on account of such breach, is not such a mistake of fact as will enable it to recover back the money. It will be presumed that the company either knew the fact, or intended to waive any such defense, and voluntarily paid the money. Otherwise there would be no end to controversy and litigation, and the party receiving the money would hold it subject to a lawsuit until the statute of limitations intervened.

This rule has no application except in the absence of fraud in procuring the policy, and of fraudulent representations made to obtain the money, which were designed to, and did have the effect of preventing inquiry. *Phillips on Ins.*, 593; *Angell on Fire and Life Ins.*, § 409; 27 *Barb.*, 354. *Sutherland, J.*, in the last case says: "In this action they must be deemed by the payment to have settled or waived all questions of law or of fact as to the validity of the original contract, except fraud, which they had the means of raising when they paid the loss."

1 *Wend.*, 357; 1 *Esp.*, 279; 20 *J. R.*, 196.

The pleader evidently took this view in preparing the complaint, and I think he was right.

The judgment must be reversed and a new trial ordered, costs to abide event.

All concur; *Peckham, Folger and Anderson, JJ.*, in result.

from "his own hands" was undisputed, and the insurance company refused to pay, contending that under the clause recited the policy was "void and of no effect." The plaintiff contended, however, that he was not in his sound mind at the time of his self-destruction, and that therefore the company was liable, notwithstanding the condition in the policy. On the trial below, the question of sanity was submitted to the jury, who found for the plaintiff the full amount of the policy and interest, \$5,800.

A writ of error was taken to the Supreme Court, which came up for argument at the May Term, 1873. The particular error complained of was the submission of the question of sanity to the jury. That portion of the charge fully appears in the opinion of the Supreme Court.

JAMES F. MILLIKIN, AND H. M. BALDRIGE, ESQS., *for Plaintiffs in Error.*

SAMUEL S. BLAIR, ESQ., *for Defendant in Error.*

MEROUR, J.

The distinction now so strongly pressed by the counsel for the plaintiff does not appear to have been made in the court below. The attention of the court was not called to the moral nature and consequences of the act of the insured, in either of the four written points upon which it was requested to charge the jury. Neither in answer to the points, nor in the general charge, was there any allusion to his comprehension of the moral aspect of the case. The court was considering the destruction of the physical life only of the insured. It was his physical life only that was covered by the policy of insurance. That was the only life in the meaning of the contract that had been destroyed. The question which arose, and which was considered by the court and jury, was whether he had sufficient mental capacity to intelligently comprehend that the act which he was about to commit would forever destroy that life. Bearing in mind, then, that this was the subject matter covered by the insurance, and that it was for the loss of this alone the action was brought, we will consider that portion of the charge specially assigned for error.

It is this: "If, at the time the pistol was fired, Isett was conscious of the act he was committing, and then intended to take his life, and had sufficient mental capacity to comprehend the nature and consequences of his act—if so, then the defendants are not liable. If, on the other hand, he was not thus conscious, but acted under an insane

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SUPREME COURT OF PENNSYLVANIA,

MIDDLE DISTRICT.

MAY TERM, 1878.

*Error to the Court of Common Pleas of Lancaster County.*

THE FARMERS' MUTUAL INS. CO., OF LANCASTER  
COUNTY, *Plaintiff in Error,*

vs.

ABRAHAM FORNEY ADM'R OF GRAYBILL B.  
FORNEY, DECEASED, FOR THE USE OF HENRY B.  
GRAYBILL, *Defendant in Error,\**

*Held*, that by the sale of the premises insured under the proceedings of the Orphans' Court, there was no such alienation before confirmation as avoided the policy; and that the action was rightly brought in the name of the administrator to the use of the vendee.

*Held*, that the vendee had sufficient interest to entitle him to give notice to the company of the loss.

*Held*, that the agreement that "in case any loss should occur to our respective properties by fire, we will only claim and receive three fourths of the amount of the actual loss, provided three fourths of the amount as aforesaid does not amount to more than three fourths of the sum insured," was not to apply when three fourths of the amount of the actual loss shall exceed three fourths of the sum insured. The agreement then is inapplicable in case of a total loss, and the insured is entitled to receive three fourths of the actual value of the property insured.

This case arose under the following facts: Graybill B. Forney, on the 13th April, 1857, took out a policy of insurance in the Farmers' Mutual Insurance Company of Lancaster County, Pa., for \$4,405, upon property owned by him, in which was included a two-story stone dwelling-house used as a store and tavern. The amount insured upon the stone house was \$3,000, which was subsequently, on September 11th, 1858, reduced to \$2,000 by a memorandum written across

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\* Decision rendered July 2nd, 1878.

that Forney being a party to the agreement recited was bound by it, and that under no circumstances could there be a recovery of more than three fourths of \$2,000—the amount insured.

N. ELLMAKER AND A. M. FRANTZ, *for Plaintiff in Error.*

T. E. FRANKLIN AND O. J. DICKEN, *for Defendant in Error.*

SHAWSWOOD, J.

It is clear, both upon principle and authority, that by the sale of the premises insured under the proceedings in the Orphans' Court, there was no such alienation before confirmation as avoided the policy; and the loss having occurred between the sale and the confirmation, the legal title was then in the heirs of Forney, and the action on the policy was rightly brought in the name of the administrator to the use of the vendee. *Insurance Company vs. Updegraff*, 9 Harris, 518; *Reed vs. Lukins*, 8 Wright, 200; *Hill vs. Cumberland Valley Mutual Protection Co.*, 9 P. F. Smith, 474.

It is equally clear that the vendee had sufficient interest to entitle him to give notice to the company of the loss. As well remarked by the learned judge below, if the clause be literally taken, in case the member insured was dead at the time of the fire, no one could give notice. His personal representative, succeeding to his legal right as covenantor, is a trustee for the heirs or the vendee, and either the trustee or *cestuy que trust* sufficiently represent the party for that purpose. In the case before us it appeared that both joined in the notice, which was received by the secretary of the company without objection.

It must be conceded that there is some difficulty as to the legal construction of the agreement given in evidence, signed among others by the insured member, Graybill B. Forney. This paper was drawn up in pursuance of certain resolutions of the directors of the insurance company, to a copy of which it is attached. The whole must be considered as one instrument, and be construed together. The principle intended to be adopted by the company was that every member insured should stand his own insurer to the extent of one fourth of any loss which should occur. This was for the safety of the company, to induce care as well as honesty on the part of the insured, as he must himself be a loser by every fire, and could not throw the entire loss upon the insurers. The 16th section of the by-laws had declared that not more than three fourths of the actual

the deed or writing depends. Wharton's Law Lexicon *ad verbum*.

The agreement was not, therefore, to apply when three fourths of the amount of the actual loss shall exceed three fourths of the sum insured. In the case before us, three fourths of the actual loss does amount to more than three fourths of the sum insured. The agreement, then, is inapplicable. The insured is entitled to receive the whole sum insured; but as by the sixteenth by-law this is only three fourths of the actual value, the spirit of the agreement is maintained. This must be so in every total loss; the sum insured being only three fourths of the actual cash value, the loss must of necessity be more than three fourths of the sum insured. We hold the agreement not to have been intended to reach the case of a total loss, already provided for sufficiently by the sixteenth by-law. It is to be observed, also, that the agreement was executed to give a construction to the existing contracts—not to make an entirely new rule. It declares that it is “to avoid doubt and difficulty.” Now the construction of the contract in connection with the by-law was without doubt or difficulty, in case of total loss. The insured bore one fourth of it, which, upon a fair interpretation of the whole paper, resolutions and agreement, was what we think was intended.

What the effect of the proviso may be in cases of partial loss is not now before us for determination. We express no opinion upon the subject. It is not easy to understand what the penman meant; it is certainly obscurely and unhappily expressed, so as to convey any clear meaning. If I might hazard a conjecture, (which, however, is entirely my own,) it would be that by “sum insured” was meant the sum which was the basis of the insurance—in other words, the valuation of the premises in the policy, a change of phraseology which makes the whole simple and just. It perhaps occurred to the writer that the broad word “three fourths of the actual loss,” might entitle the insured to demand more than three fourths of the valuation.

There can be no question that the offers of parole evidence to explain the writings were rightly rejected.

Judgment affirmed.

value of the property thus exchanged for the farm was in controversy.

John Nutting was allowed, subject to exception, to testify what he paid in 1867 for the Thomas Nutting farm, with the buildings thereon—the nearest bounds of said farm being less than a mile from the nearest bounds of the Thompson place, but the distance by the road being from a mile and a half to a mile and three quarters. He was also allowed, subject to exception, to state the price at which the Thomas Nutting farm was bid off at auction in 1870.

In 1869, one Capen had exchanged the Thompson place for certain lots of land in Wentworth, and a \$3,000 note. Subject to exception, Reuben Hobbs was permitted to testify what he paid in 1869 for a tract of about 800 acres of woodland in Wentworth, in another section of the town, and several miles from the lots conveyed to Capen. The land and timber on this 800 acre tract were described as similar to the land and timber on the Capen lots. It appeared that Hobbs, some ten or fifteen years prior to the conveyance to Capen, had cut the spruce timber from the greater portion of the Capen lots; also, that he had had considerable experience in dealing in woodland in Wentworth. Subject to exception, Hobbs was permitted to give his opinion upon the cash value of the stumpage of the hard wood upon the Capen lots.

Moses Pervear was at the time of the fire, and is now, the owner and occupant of a farm adjoining the Thompson place. Subject to exception, he was permitted to give his opinion as to the cash value of the Thompson place, including the buildings, at the time the fire occurred. The plaintiff objected that there was no proof of Pervear's competency to judge.

It appeared that Charles Mitchell is a farmer, residing about one mile from the Thompson place; that he formerly owned a piece of land which is now a part of the northerly portion of the Thompson farm; that he owns a pasture adjoining the Thompson farm on the east; that in going to this pasture he used to go over part of the Thompson farm, tying his horse at, or near, the buildings; that he had had occasion, within a year or two, when hunting for sheep, to go over that part of the Thompson farm on the same side of the road as the buildings, going up to the edge of the woods; also, that he had been into the house, and had some knowledge of the barn. Subject to exception, Mitchell was allowed to give his opinion as to the cash value of the Thompson place, including buildings, at the time of the fire.

Nutting farm was in 1867, but as the time of the year is not stated, it may have been several months more, or a month or two less, than three years before the insurance.

In *Thornton vs. Campton*, 18 N. H., 20, a sale of the real estate in question, in the spring of 1816, was held to be admissible as bearing on the value of the same estate during the four years ending in the spring of 1814; and the court, by Gilchrist, J., say that the causes which produce changes in the value of land and in the value of money are, commonly, so gradual in their operation that very safe inferences may be formed from the present value of a particular estate, as to what it was two, four, or six years ago, by persons conversant with the business of the neighborhood.

This would be especially true of the cultivated farms in our State, and we think it would clearly be within the discretion of the court to receive the testimony offered in this case.

Whether the evidence offered is too remote in point of time must necessarily be left very much to the discretion of the judge who tries the cause, and ordinarily that discretion will not be revised unless it be clearly reserved for that purpose.

That the question of remoteness in respect to time is left to the discretion of the judge who tries the cause, is too well settled in this State to need the citation of authorities, and it is not questioned by counsel.

The testimony of Reuben Hobbs as to the price paid for other woodland in Wentworth was, we think, admissible in the discretion of the judge, although several miles from the lots conveyed to Capen. It is quite obvious that there might be such similarity, in respect to character and location in relation to a market, as to furnish great aid in fixing the value of the Capen lots.

As to his opinion of the value of stumpage on the Capen lots, it was for the court to judge whether he was qualified to give an opinion. It is made competent by statute, and we cannot revise the decision of the judge on the qualification of the witness.

In regard to the testimony of Pervear and Mitchell, the same remarks that were made in respect to the opinion of Hobbs apply, namely, that the qualifications of the witnesses to give opinions as to value are to be determined by the judge who tries the cause.

The course allowed to be taken in the cross-examination of witnesses on the stand, in reference to their depositions, was not in accordance with our approved and settled practice. Witnesses should not ordinarily be asked to read to the jury passages in their depo-

defendant's] cross-examination, the plaintiff's counsel produced a deposition admitted to be a deposition given by the defendant in this case, taken at the plaintiff's request, and proposed to read, or that the defendant on the stand should read, portions of it to the jury. The court ruled, as a matter of discretion, that this should not be done until the evidence on the part of the defense had been introduced; and the plaintiff excepted. The plaintiff then proposed to put the deposition into the defendant's hands, and to cross-examine him upon it. The court ruled that the contents of the deposition should not in any way be made known to the jury during the cross-examination of the defendant, for the purpose of impeaching or contradicting him, or showing any inconsistency between the deposition and his testimony on the stand, or asking him to explain anything in the deposition, but that, when the plaintiff put in his rebutting evidence, he might read the deposition to the jury, and recall the defendant to explain any apparent inconsistency, or to explain anything in the deposition that requires explanation, to which ruling the plaintiff excepted. After the defendant rested his case, the plaintiff's counsel read to the jury such portions of the deposition as they chose, and the defendant was subsequently recalled as a witness by his own counsel, and was cross-examined by the plaintiff." On a case reserved, it was held (Perley, C. J., delivering the opinion) that the order in which evidence shall be given, and the right of examination exercised, is in our practice very much in the discretion of the court; that the habit of cross-examining witnesses as to their former testimony in the same cause is one liable to abuse; that if there was any contradiction, in that case, between the deposition and the testimony of the witness on the stand, the plaintiff had sufficient opportunity to show it; and the course taken at the trial was approved as the correct practice. The decision of this question was not reported (47 N. H., 186), because it was not regarded as establishing any new or settling any doubtful point.

There can hardly be any occasion to identify a deposition, or to prove the signature of it, by the deponent on the stand, or to ask him any question in regard to it, until he is recalled after it has been regularly put in evidence at the proper time, which is not during his examination or cross-examination. Such matters as the identity of the paper and of the witness, and the genuineness of the signature, are not usually in dispute, and it would be well not to anticipate any controversy on those points, but to wait and see what objections will be made to the introduction of the deposition when it is offered at



the proper time. The subject is one on which no absolute rule can be laid down, because it is a matter of fact and of reasonableness. (Darling vs. Westmoreland, 52 N. H., 408.) In this case, there is no error in law for which a new trial should be granted.

Judgment on the verdict.

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## COMMISSION OF APPEALS OF NEW YORK,

JUNE TERM, 1872.

LAURA B. MALLORY, *Respondent*,

vs.

THE TRAVELERS' INS. CO., OF HARTFORD, *Appellant*.\* }

Deceased took a policy of insurance on his life for the benefit of the plaintiff. At the time of insuring he stated that there were no circumstances which rendered him liable to accident, and that he belonged to a preferred class of risks. Deceased was found dead in a culvert near a railroad bridge, and showed marks of violence. A post mortem examination showed that his heart was enlarged.

*Held*, that the decision of *Ellen E. Mallory vs. same*, (47 N. Y., 52,) must control this decision.

*Held*, that the exception, "suicide, whether felonious or otherwise, sane or insane," may be presumed was intended to cover a suicide committed with a deliberate design by a person in sound mind, and further, that the company should not be responsible if the insured, in an insane state, by his own act, destroyed his life by any of the means usually resorted to for the achievement of that purpose.

*Held*, that counsel who make a motion to nonsuit must point out to the court, in some specific and intelligible form, some defect in the evidence showing that he cannot recover. If this is not done in the court below, it is too late in the court of last resort.

*Held*, that the death being by accident, the proviso, "sane or insane," did not apply.

Appeal from the judgment of the General Term of the Supreme Court of the Second Judicial District, affirming a judgment entered upon a verdict in favor of plaintiff, and an order denying a new trial.

This action was brought to recover the amount of an accidental policy of insurance upon the life of William S. Mallory, deceased.

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\* Decision rendered June Term, 1873.

Previous to and on December 3rd, 1866, the deceased was an agent of defendant in soliciting applications for insurance, and on that day he applied for and procured an accidental policy of insurance on his life, of \$3,000, for the benefit of plaintiff, his wife, and made payable to her. In his application he stated that there were not any circumstances which rendered him peculiarly liable to accident, and that he belonged to the preferred class of risks.

On the morning of June 5th, 1867, the assured was found dead in a millpond, near the railroad culvert, in East Bridgeport, Connecticut. The water was 10 or 15 feet deep. The last time he was seen alive was in the morning of June 2nd, 1867. When found there was a wound on the back part of the head, about an inch and a half long, and cut clear to the skull. His hat disclosed marks of a blow, corresponding with that appearing upon his head, and there was blood found in the hat. A post mortem examination showed that his heart was enlarged.

Deceased had had typhoid fever over 20 years before his death, and was then flighty, from which he had recovered at the time, and he had been in an insane asylum for a little over two months about two years before he made his application for the policy in suit, but was discharged cured. The policy contained a clause, in substance, that no claim should be made under it if the assured came to his death by "suicide, whether felonious or otherwise, sane or insane."

J. R. ALLABEN, *for Respondent.*

REYNOLDS & WARD, *for Appellant.*

REYNOLDS, C.

The decision of the Court of Appeals in the case of *Ellen E. Malory vs. the same defendant*, (47 N. Y., 52,) must, I think, control our decision in this, even if, as an original question, we should entertain any doubt of the plaintiff's right to recover. I am free to admit that, to my understanding, the plaintiff's case is not free from difficulty, but as the facts relating to the condition and the death of the assured are the same in both cases, we are only to follow the judgment pronounced in favor of the daughter in rendering our judgment in favor of the widow, if no material distinction between the two cases can be discovered. It is suggested that the two policies differ in this respect: In this case, "suicide, whether felonious or otherwise, sane or insane," is excepted from the operation of the policy, while in the other case, the exception was simply against "suicide."

some form accidentally killed. The finding of the jury in this regard is not without evidence.

It is difficult to see how the wound upon the back of the head of the dead man could have been self-inflicted, and furthermore, if it was done by his drowned body floating upon sharp rocks and oyster shells, it is questionable whether his hat would have disclosed marks of a blow corresponding with that appearing upon the head of the unfortunate man when his remains were taken from the water. But all this was for the jury. It is unquestionably true that it was incumbent upon the plaintiff to give evidence sufficient to convince the jury that the death was the result of accident, and this was done. By way of defense, the defendant was at liberty to show that the death resulted from natural disease or suicide. This effort, in the opinion of the jury, failed. It was very certainly no error to say to the jury that the act of suicide was against the presumption of every reasonable man.

I have not specially noticed the very numerous exceptions taken during the trial, for as I think the principal question must be ruled against the defendant, they in the main are not material.

It follows that the judgment of the Supreme Court must be affirmed with costs.

All concur.

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## COURT OF APPEALS OF VIRGINIA,

DECEMBER TERM, 1872.

*Appeal from the Court of Hustings, City of Portsmouth.*

THE PORTSMOUTH INSURANCE COMPANY

vs.

H. G. BRINCKLEY & CO., FOR THE BENEFIT OF WM. H. MORRIS, JR., ADM'R OF H. G. BRINCKLEY.\*

Defendant in error took a policy of insurance in the company of the plaintiff in error, covering their stock of goods, "consisting of such as are usually kept in a

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\* Decision rendered February 10th, 1873.

grocery store." Policy also contained clauses excepting hazardous or dangerous occupations, and declaring that the interest of the insured was signable unless by the consent of the company manifested in writing, in case of any transfer or termination of interest of the assured, either by otherwise, without such consent, the policy shall be void and of no effect, that burning-fluids should not be kept in the building. Evidence introduced showing that burning-fluids were kept in the store, and the knowledge of this fact was constructively in the possession of the plaintiff and agent of the company.

Subsequently to the issue of the policy of insurance the partnership of the insured was dissolved by the retiring of one member of the firm.

*Held*, that the policy plainly excepted burning-fluids from the terms of the general description of the policy, and expressly prohibited them.

*Held*, that a sale by one partner to another of his interest in property in which there is a clause in the policy prohibiting the sale without the consent of the company avoids the policy.

*Held*, that the declaration should have stated the value of the property destroyed.

JOHN AIMARD, for Plaintiff in Error.

HOLLOWAY & GAYLE, for Defendant in Error.

WINGFIELD

This is an action in the name of H. G. Brinckley & Co., sued for the benefit of H. G. Brinckley against the Portsmouth Insurance Company. The declaration alleges that the said company on the 3rd of August, 1867, entered into a contract, a copy of which is marked "A," is filed as part of the declaration, whereby the defendant, in consideration of fifteen dollars, did insure the plaintiff against loss or damage by fire to the amount of fifteen hundred dollars on their stock of goods, "consisting of such as are usual in a grocery store, situate in a certain house" (describing it). By which contract the defendant, in consideration of the said sum of fifteen dollars then paid, promised, in the event of the destruction of the aforesaid stock by fire, to pay the plaintiff the sum of \$1,500 sixty days after proof of such loss, and then alleges the breach of the contract as follows: "And whereas, on the 30th day of November, 1867, the aforesaid stock so insured did become entirely destroyed by fire, and the said defendant then, under their aforesaid contract, came indebted to the plaintiff in the sum of \$1,500; nevertheless the said defendant, not regarding the plain intent and meaning of the contract, have not paid the plaintiff the said sum of \$1,500, as part of it, according to the plain intent and meaning of the contract, but have refused," etc.

The contract, filed with the declaration as part of it, stipulated to insure the said H. G. Brinckley & Co. against loss or damage by fire to the amount of \$1,500 on their stock of goods, "consis-

such as are usually kept in a family grocery, the privilege being allowed of keeping on hand two kegs of powder, which are to be located conveniently for removal," and agreed to make good to the insured all such loss or damage as should happen to the property insured within the time specified, "the said loss and damage to be according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof, made by the assured," etc. The policy has a clause or provision in these words: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall at any time after the making, and during the time this policy would otherwise continue in force, be appropriated or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the terms and conditions annexed to this policy, or for the memorandum of special rates, except as herein specially provided for or hereafter agreed to by this corporation, in writing, to be added to and indorsed upon this policy, then, and from thenceforth so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no effect." Also another to this effect: And it is agreed that this policy "is made and accepted in reference to the proposals and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligation of the parties hereto, in all cases not herein specially provided for," and also a further provision that the interest of the assured in the policy was not assignable unless by consent of the company "manifested in writing, and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

And under the memorandum indorsed on the policy, "proposals for insuring houses, buildings, stores, ships," etc., after specifying under the class as "extra hazardous," such trades, business and subjects as came under it, and subjecting them to an additional charge of 50 cents on 100 dollars, the following provision is indorsed: "Gunpowder is expressly prohibited from being deposited, stored or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent in writing on this policy. All kinds of burning-fluids are similarly prohibited, (family use of them being allowed.)"

The defendant demurred to the declaration, and the same being ar-

gued, was overruled by the court, and then a plea of no was put in and issue made upon it.

On the trial the plaintiff introduced evidence tending to the president and agent of the company came to the store Brinckley & Co., (which firm was composed of H. G. Brinckley and James Woodward,) soliciting their insurance, and at the time was conspicuously placed in their store a tin cask, such as is used for keeping burning-fluid in, having thereon, in painted words "Kerosene oil;" that the contract of insurance was made with the said James Woodward, and that after the policy of insurance was prepared, it was brought to the store by the president of the company, and delivered to the said Woodward; that on the 1st of November following (and within the time covered by the policy) the entire stock insured thereby, valued at about \$8,000, was destroyed by fire, and that notice and proof of loss and damage made by the insured in conformity with the conditions of the policy, and presented to the defendant sixty days prior to the institution of the suit, and that the said fire was occasioned by accidental ignition of a barrel of burning-fluid; and also, at the time, and before the insurance was effected, said H. G. Brinckley kept burning-fluid for sale, and intended at that time thereafter to keep the same for sale; that burning-fluids were kept in Portsmouth (where the plaintiffs had their store) as the stock of "a family grocery store;" that at the time the insurance was effected, nothing was said in relation to the keeping of burning-fluid; that the burning-fluid in the store at the time of the fire was kerosene oil, which was considered less dangerous than kerosene because less inflammable, and that after the fire the defendant objected to paying the policy on the ground that Woodward had signed his interest in the stock to the other partner, (Brinckley) retired from the firm before the loss, without the consent of the company in writing to the sale and assignment of his interest in the policy.

And the defendant on its part introduced evidence to show that after the policy was effected, and before the loss by fire, Woodward retired from the copartnership, having sold his interest in the stock insured to Brinckley, leaving Brinckley the sole owner of the store; that the sale was without the consent of the plaintiff, and that it had no knowledge of the sale until after the fire; that the agent of the defendant did not know, at the time the policy was effected, that Brinckley & Co. kept any kind of burning-fluid.

he understood no kind of burning-fluid was to be kept in the store, although nothing was said by either party about burning-fluid; that the astrella oil, the ignition of which caused the loss by fire, was first kept in the said store after effecting the said insurance, and that it was highly and dangerously inflammable; that the privilege of keeping burning-fluids was not intended to be given by the phrase used in the policy, "stock of goods, consisting of such as are usually kept in a family grocery;" that it was not customary for the defendant to give to parties assured the privilege of keeping burning-fluids, unless it was specially in words, in writing, indorsed on the policy, as in this case is done in relation to gunpowder.

After this evidence was given in, the court, at the instance of the plaintiff's counsel, instructed the jury that "if they believe from the evidence that, at the time the insurance was effected, burning-fluids were articles usually kept in a family grocery store, then the insured in said policy had permission in writing indorsed thereon to keep burning-fluids;" and then the defendant's counsel moved the court to instruct the jury "that if they believed from the testimony that H. G. Brinckley purchased the entire interest of his co-partner in the stock of goods, insured before the loss by fire occurred, without the consent of the defendant, then the said policy was void after said purchase," which the court refused to give; and the defendant excepted to the opinion of the court in giving the instruction asked for by the plaintiff, and in refusing to give that asked for by the defendant.

2nd. The defendant then moved the court to instruct the jury "to disregard so much of the evidence given by the plaintiff as tended to show that burning-fluids were articles usually kept in a family grocery store," upon the ground that said evidence was not admissible in law upon the issue, and as tending to vary and control the written agreement of the parties, which was refused and the defendant excepted.

3rd. The defendant then moved for a further instruction to the jury "to disregard so much of the evidence given by the plaintiff as tended to show that, sixty days before the institution of the suit, due notice of the loss and damage by fire, and proof thereof, made by the assured in conformity with the conditions annexed to the policy, were given to the defendant," upon the ground that said evidence was not admissible in law upon the issue joined on the allegations of the plaintiff's declaration, which was likewise refused, and the defendant again excepted.

4th. After the verdict was rendered, the defendant moved the court to set it aside and grant a new trial, which motion was overruled, to which the defendant likewise excepted, and the facts proved were certified by the court, and do not differ from the facts stated in the evidence already recited.

The propriety of the instruction given at the instance of the plaintiff, and of the admission of the evidence mentioned in the defendant's second bill of exceptions, depends upon the question whether, by the general terms, "stock of goods consisting of such as are usually kept in a family grocery," used in the policy, overrode and abrogated the exception of burning-fluids in the condition of the specification indorsed on it, that it was not to be kept without a written permission, to be indorsed on the policy, and that those general terms, notwithstanding the exception specified in the indorsement, was a permission in writing to keep burning-fluids (it being proved that it was usual to keep them as part of the stock of a family grocery.)

The authorities upon this subject seem to be conflicting. In New York the decisions have been uniform, that where the insurance is in general terms on "a stock of goods such as are generally kept in country stores," or "groceries," and the like, and a clause in the policy provides that it shall be void if any articles mentioned in a certain class of hazards annexed to the policy are kept, except as therein specially provided for, or to be thereafter agreed to in writing; nevertheless, by the use of terms by which they would be included, they are specially provided for in writing, and the printed clause in the policy prohibiting them is repugnant and void. In delivering the opinion of the court in *Pendar vs. Kings County Fire Ins. Co.*, 36 N. Y., 648, (which was an insurance on a stock "such as is usually kept in a country store," with a clause providing it should be void if articles specified as hazardous or extra hazardous were kept—among which were gunpowder and spirits of turpentine,) Grover, J., said: "The evidence showed that spirits of turpentine and gunpowder were usually kept in country stores. These articles are thus brought within the description of the policy and covered by it \* \* \* etc. We have seen that in the present case the policy, properly construed, covered gunpowder and spirits of turpentine, and when these articles are insured, a printed clause prohibiting their being kept is plainly repugnant to the written clause insuring them, and by the authority of the cases, (he cited *Harper vs. Albany Mutual Ins. Co.*, 17 N. Y., 194, and *Harper vs. New York Ins. Co.*, 22 N. Y., 441,) the printed



clause must be governed by the written. The policy was therefore not void at the time of the fire by reason of keeping the spirits of turpentine and gunpowder. It cannot be held that the effect of the printed clause in the present case is to except spirits of turpentine and gunpowder from the general description of the property insured, *without* overruling. *Harper vs. The Albany Ins. Co., and Same vs. The New York Ins. Co., supra.* The counsel for the defendant in error cited a number of other cases, and some from other States, but as they are all to the same effect, and none of them stronger for his side than the one above quoted from, I do not deem it necessary to make any extracts from them, or refer to them more particularly. While on the other hand the decisions of the courts of Massachusetts are as uniformly the other way, and are sustained by the courts of some of the other States, as well as by the Supreme Court of the United States. In the Massachusetts case of *Whitemarsh vs. Charter Oak Fire Ins. Co.*, 2 Allen, 581, Bigelow, C. J., said: "The policy declared on contained a stipulation that it should cease and be of no force or effect, if the assured should keep any of the articles, etc., denominated hazardous or extra hazardous, or included among the special hazards, in the memorandum annexed to the policy. It is admitted that oil and sulphur, which are expressly named as hazardous articles, and matches, which are deemed extra hazardous, and all of which subject the building and contents to an increased rate of premium, were kept on the premises at the time of the fire. This was a clear violation of the stipulation in the contract of insurance, and put an end to it *ex vi termini*. It is urged on behalf of the plaintiff that the general description in the application and policy, of the purpose for which the building was occupied, as a provision and grocery store, gives the right by implication to keep these hazardous articles as a part of the stock appertaining to such a business. But there are two difficulties in the way of adopting such an interpretation of the contract, which are insurmountable. In the first place, it militates with the clear and unambiguous terms of the agreement. Hazardous and extra hazardous articles are expressly prohibited, "if not specially provided for;" in the face of this language it is impossible to hold that a general description of the building, and the purpose for which it is occupied, will allow the assured to keep articles of a dangerous and inflammable nature, which are not necessarily comprehended within a fair and reasonable interpretation of the general words used;" and the other cases from that State, cited by the counsel for the plaintiff in error, are to the same effect, as are

also cases in some of the other States, and in the Supreme Court of the United States; from one of the latter, *Steinbach v. Co.*, 13 Wallace, 183, I will quote the very terse opinion of the chief justice, in delivering the opinion of the court. "The only question in this case arises upon the construction of the policy sued on. It contained a clause providing that, among other things, should be specially written in the policy, otherwise they were not to be covered by the insurance. It was contended that fireworks are included under the name of 'fireworks.' But the plaintiff contends that they are included in the name of 'other articles in his line of business;' the answer to which the policy itself requires that fireworks shall be specially written in. They are among the goods described as specially hazardous, and add 50 cents on the \$100 to the ordinary rate of insurance. It is impossible to think they are described by the general term 'fireworks' in the policy; the insurance was at the ordinary rate. The court doubt the evidence was properly rejected."

Flanders, in his recent work on fire insurance, pp. 100-101, follows down the law in conformity to the New York decisions.

The reason generally assigned for this is that in filling out the blanks in the printed forms, the parties have their attention particularly directed to the written matter of the instrument, and to the printed part of it, and that therefore the part in writing prevails over the printed provisions and conditions. I cannot assent of my mind to this. If there was indeed an absolute and irreconcilable repugnance in the contract between the written and printed provisions, then, taking the whole contract together and considering all its parts and provisions, it ought to be so construed as to carry out the intention of the parties as gathered from the scope and meaning of the instrument taken together as a whole, giving due consideration to the language used in each and all of its provisions, and the repugnancy, if any, would have to yield to the intent and meaning, ascertained by such construction, whether in the written or printed part of the instrument.

But in fact is there any irreconcilable repugnancy in the contract mentioned in the New York cases or the one under consideration? that, by a fair and natural interpretation of the language of its provisions, effect may not be given to each and all of its parts, and make it harmonize and stand together as a whole, effecting the purpose of all of its parts and provisions? I think not.

It cannot be doubted that where terms are used of

character, that a number of different articles or subjects might be included under them, that any one of the articles or subjects might be excepted out of the operation of the general description, and so not be included under it.

The words "stock of goods consisting of such as are usually kept in a family grocery," standing alone, unconnected with the policy of insurance, would be unmeaning so far as any contract was concerned. To give them any meaning they have to be read with the printed part of the policy. The written parts, as well as the printed parts, would be unmeaning by themselves, and to give them any meaning they have to be read and construed together, and the written words being inserted in the policy, they have to be combined with and considered in reference to the printed parts to make and express the contract of the parties. Suppose in the policy, immediately after the general description of the stock to be kept in the store, there had followed in the printed form these words: "except that all kinds of burning-fluids are expressly prohibited from being kept except by special consent in writing;" could it be doubted that such fluids were excepted out of and were not covered by the terms of the general description, or that the exception did not operate because it was in printed words instead of written? I think not, and I can see no reason why they should not have equal effect when they are found in another part of the instrument and apply to the subject as aptly and plainly as if they followed it immediately after the clause as I have supposed. Nor is there any reason that I can perceive why the written part should apply and have more effect as to one part of the printed part of the contract than another. When the blanks in the printed form were filled up in writing, and it was executed, it was one entire contract, composed of the written and printed words together.

I think, therefore, that the policy itself plainly excepted burning-fluids from the terms of the general description of the goods to be kept, and expressly prohibited them.

I think that the rule laid down by the courts of Massachusetts and the Supreme Court is the better law, and founded in better reason, and ought to be followed in preference to those of New York; and therefore I am of opinion that the objections of the defendant to the rulings of the court below on this point, mentioned in the first and second bills of exceptions, were well taken.

The next question is, did the sale and transfer, by one of the partners to the other, of his interest in the stock of goods insured, and his interest in the policy, without the consent of the company, vitiate

the policy. Upon this question, also, the most of the decisions of New York courts are in conflict with the decisions of the courts of the other States. And Angell, in his work on life and fire insurance, follows the New York cases, and lays down the rule to be (§ 197) that when several owners of property are jointly insured, a sale by one of the owners of his interest to the others is not such an alienation of the property as will avoid the policy, even under an express provision in the act incorporating the company, that if any property insured by it "shall be alienated by sale or otherwise, the policy shall be void"—yet if he had conveyed to a stranger the policy would cease to operate as to that share at least—and the reason given is, that it is not, strictly speaking, an alienation but a change of interest among joint owners; that no stranger is introduced, no addition to the number of the assured is made; one partner of the concern retires and sells his interest to the others. The company, therefore, runs no risk of having careless or improvident persons substituted to the place of the original persons with whom they dealt.

Flanders, on the contrary, pp. 428-9, lays down the rule to be that where insurance is effected by partners or co-tenants, a sale by one of all his interest by one co-tenant, or by one partner to another, is within the prohibition of a policy of insurance which declares that alienation, "by sale or otherwise," shall forfeit the policy, and under such a clause against a transfer or change of title, a dissolution of the firm and a division of the partnership property among the partners, so that each is to hold his share separately and distinctly, is not strictly a sale of the goods, yet it operates a change of title in the goods and discharges the insurers. And Parsons, in his work on contracts, pp. 19 and 20, Ed. of 1864, lays it down as a general proposition, that a guarantee to a partnership is extinguished by a change in the firm, although the partnership name is not changed, and that this has been held to be the effect of such change, although the guarantee to the firm was expressly for advances 'by them or either of them; and says 'a guarantee may doubtless be a continuing contract, and be unaffected by a change of circumstances as to the subject matter, and as to the parties for whose benefit it shall inure,' etc.—provision may be made for its validity to a partnership after a change of members. But from what has already been said, it will be obvious that, under the contract of guarantee expressly provides for these changes, the occurrence discharges the guarantor from his obligation."

And while there is some conflict in the decisions of the courts of New York on the subject, the decisions of the courts of the other

States, so far as I have been able to ascertain, have been that a sale by one partner to another of his interest in property assured, where there is a clause in the policy prohibiting a sale without consent, avoids the policy. It seems to me that this must be so on principle, which would not sanction the making or changing of a contract without the consent of each of the parties to it. In answer to this objection, Porter, J., in *Hoffman & Place vs. Etna Insurance Co.*, 32 N. Y., 405, said: "The company testified their confidence in each of the insured by issuing a policy to them," and that "the only evidence of their confidence in either is the fact that they contracted with all, and the theory is rather fanciful than sound; that they may have intended to conclude a bargain with rogues on the faith of a proviso that an honest man should be kept in the firm to watch them; and that there was nothing in the case to indicate that all the insured were not worthy of confidence."

There is, I think, something more in the matter than the mere integrity of the parties in point of honesty, and I think the learned judge's answer is not altogether satisfactory or conclusive. The guarantor here had a right to have the care, prudence, and diligence of each of the parties, stimulated by his interest in the stock of goods, to prevent their destruction by fire. It was the duty as well as the interest of each of the partners, at the time the contract was made, to do all that was in his power to take care of the goods and prevent their destruction, and the defendant had a right to have the continuance of that joint interest and care.

"Generally speaking," (says Chief Justice Marshall,) "insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest." *Columbian Ins. Co. vs. Lawrence*, 2 Peters, 25. And Chief Justice Mansfield, in deciding a case before him, very truly said that parties might be induced to enter into engagements "by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners of a firm." "In the nature of things," he says, "there cannot be a partnership of several persons in which there are not some of the persons possessing those qualities in a greater degree than the rest, and it may be that the party going out was the very party on whom the securities relied; it would therefore be very unreasonable to hold the security to his contract after such change." *Weston vs. Burton*, 4 Taunt.

The contract of assurance in the case before the court was made

with Woodward, the retiring partner. It is said that burn were kept in the store while he was a partner, and no accident occurred in consequence of it; who can say that if he had a partner, that his diligence and prudence would not have prevented the accident from which the fire occurred? Upon the whole, the court is of opinion that the sale by Woodward of his interest in the company was insured to the plaintiff, without the consent of the company to issue the policy, and that the court below committed an error in the instructions asked for the plaintiffs, and set out in the following exceptions.

As to the demurrer to the declaration, I think the declaration is clearly defective in not alleging the value of the property destroyed, or that it was of some value, and in not alleging that due proof of the loss was given to the company sixty days before the suit, as required by the terms of the policy; for this (as the court did not ask leave to amend) the demurrer ought to have been sustained; an averment of this sort would have been necessary if the suit had been brought under the Act of Assembly of the 2d of February, 1872, ch. 79; Sessions Acts of 1871-2. This error may be remedied by sending the case back, with leave to the plaintiff to amend, if the action could be maintained. But as the fact is that the plaintiff has no cause of action, the demurrer should be sustained, so as to make an end of the case at once.

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**SUPREME COURT OF MAINE,**

**MIDDLE DISTRICT, SAGadahoc COUNTY.**

**JUNE TERM, 1872.**

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**JOSEPH W. SPAULDING, *Plaintiff,***

**vs.**

**NEW YORK LIFE INS. CO., *Defendant.\****

There is no custom established among the insurance companies doing business in Maine, to pay to persons who have ceased to be agents of such companies the amount of the premium paid by them.

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\* Decision rendered ———.

commission upon premiums paid upon renewals of policies procured through the intervention of such persons during the existence of their agency.

In a suit brought to recover a percentage of renewal premiums, paid after plaintiff ceased to be agent, upon policies issued through him while acting as defendant's agent, the plaintiff was nonsuited; his engagement being that of an ordinary agent, revocable at pleasure.

Assumpsit on account annexed, and the general money counts to recover commissions on certain policies issued by defendants. These policies were originally obtained through the agency of plaintiff, and he claimed a percentage on the renewals of them after he ceased to be agent, though the premiums were no longer received and forwarded by him, but by his successor. He based his claim upon the rule referred to in the opinion of the court, and also upon an alleged custom on the part of insurance companies, doing business in this State, to pay a percentage to the agent through whom a risk was taken, so long as the policy continued in force. A default was entered, to be taken off if, upon the evidence, the court thought the suit not sustained, and judgment to be entered according to the legal rights of the parties.

Hon. Thomas B. Reed of Portland, then Attorney General for the State, for plaintiff, contended, that it makes no difference that Spaulding had ceased to be agent. The contract must be construed with reference to the subject matter, the position of the parties and the usage of the business to which it relates, which really make part of the contract and, of course, can be proved. 2 Greenl. on Ev., § 251, and cases there cited; Fisher vs. Sargent, 10 Cush., 250; Bodfish vs. Fox, 23 Me., 90; Crocker vs. The People's Mut. Fire Ins. Co., 8 Cush., 79. The testimony is not introduced to override the express contract, but to show its real meaning, as understood by the parties, by showing it made with regard to custom so general in the business as to affect defendants with presumptive knowledge of it. Indeed, such knowledge is not denied by the defense.

If he procure a substantial man to insure, who pays his annual premium during life, or a long term of years, the agent reaps by this yearly commission part of the benefit which accrues to the company from so valuable a risk. If the policy be allowed to expire after a year or two, the company loses its premium and the agent his commission thereon; and thus both are jointly interested to secure the best risks on the longest lives. Hence the custom is reasonable. The agreement then really reads: "ten per cent. the first year, and five per cent. per annum thereafter during the continuance of the policy." The defendant's general agent on the stand not only did

Henry Tallman, (formerly Attorney General,) and Cl.  
rabee, of Bath, for defendants :

The plaintiff, by his agreement, was entitled only to upon collections made and remittances sent by him; if original insurance, he should have a given percentage half as much if the policy were taken through some for

Every agent of a foreign insurance company has to from the insurance commissioner to do business in license runs for a single year, but may be renewed "c certificate from the company that his agency is continu

To remedy this difficulty, the plaintiff attempts to p but he fails to prove anything more than certain comp make an arrangement, such as they think for their ow their agents. There is no proof of any such univers ing custom as to affect the defendants with knowledge them by it. Certainly, no such custom exists between and its agents. The whole relation between them v employing a man upon specified terms when they wished and dismissing him when they were no longer require

**HENRY TALLMAN AND CHAS. W. LARRABEE, for Defen**



## APPLETON, C. J.

This action is brought to recover commissions on premiums paid after the plaintiff ceased to be an agent of the defendant's company, for renewals of policies issued by his procurement while he was such agent.

Among the rules adopted by the company was the following, which was in force when the plaintiff received his appointment as agent :

"Rule 21. This appointment is revocable *at the pleasure of the company*, and can be terminated in like manner by the agent."

As the agency thus created may be terminated at the pleasure of either party, there can be no reason for complaint whenever it is so terminated. The tenure by which it is holden is uncertain, and so recognized. Once terminated, the relation of principal and agent is at an end. The duties and the authority of the agent cease.

The plaintiff, notwithstanding he has ceased to be an agent, claims to recover a percentage on renewals of policies procured by him when agent, by virtue of the following rule, which fixes the compensation of agents :

"The commission to agents is 10 per cent. on first year's premium, and five per cent. on each renewal collected and transmitted by them. This applies to business procured by the agent under this appointment. Upon the collection of other premiums, (the risk being originally obtained by other parties,) and upon interest, the commission is  $2\frac{1}{2}$  per cent."

The compensation on renewals is for services rendered. It is due "on each renewal when collected and transmitted," and then only, by the terms of the rule. The agent has no right to his commission, save on collection and transmission of the premium. The terms of the rule imply the continuance of the agency. When one ceases to be an agent, he cannot rightfully collect, and can have nothing to transmit.

The next sentence provides for the collection and transmission of premiums collected by an agent other than the one originally procuring policies, and it gives such agent two and a half per cent. commissions. If one who is no longer an agent can have his commissions on premiums collected and transmitted by another, then the company must pay a commission of  $2\frac{1}{2}$  per cent. to the agent collecting and transmitting funds, and five per cent. to one who has ceased to be agent, and who has neither collected nor transmitted funds.

There can be no mistake as to the meaning of the rule. It allows

commissions only to the agent collecting and transmitting : paid on renewals, giving to the person procuring the origin a premium twice as large as that to any other agent, by w miums are collected.

The evidence entirely fails in showing any custom by v detendants can be bound. Other insurance companies, w rules, may have made such an allowance as the plaintiff d that would not affect the defendants. Indeed, no proof is the existence or recognition of any such custom as the pla up on the part of the defendant company. On the cont Beers, their actuary, testifies that there was no such cust defendant's corporation cannot, most assuredly, be boun customs of other insurance companies. Certainly not, w customs are not recognized by it, and are in the very teeth rules.

Default taken off. Plaintiff nonsuited.

Walton, Danforth, Peters, Cutting, and Barrows, JJ., c Dickerson, J., dissenting.

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DICKERSON

This action is brought to recover commissions on premi after the plaintiff ceased to be agent of the defendant com renewals of policies issued by his procurement while he agent. The decision of the case depends upon the const be given to the following rule of the company, fixing the c tion of agents : "The commission to agents is ten per cen year's premium, and five per cent. on each renewal collecte mitted by them. This applies to business procured by the der this appointment." Does the right of the agent unde to commissions on renewals of policies issued by his pro cease when his agency is terminated, or does it continue termination, and so long as such renewals are effected? Th to be construed with reference to the subject matter of th the inducements of the parties to enter into the contract ar spective interests to be subserved. The business to be er was life insurance, which, from its very nature, is continuou ing over an indefinite series of years, and involving numero seen contingencies. A policy once issued may be renewed f

or not at all ; whether it be the one or the other may depend, among other things, oftentimes, not a little upon the intelligence, energy, integrity, and address of the agent, through whose procurement the policy was originally issued, and under whose special charge the business continues ; for these qualifications in an agent are not only necessary to enable him to succeed in inducing persons to become insured, but also in retaining the assured, by keeping them advised of the transactions and standing of the company he represents, and of the general practicability, the advantage, and, it may be, the duty of renewing their insurance.

The value to the company of the services of an agent consists both in the number and amount of the policies he is able to cause to be underwritten, and in the number and continuity of the renewals. The value of the agency to the agent depends upon the same considerations. Indeed, his continuous interest in the renewals is the chief inducement for him to accept the agency. These identical and mutual advantages may fairly be presumed to have been contemplated by both principal and agent when they agreed upon the contract of agency. The rate of compensation agreed upon confirms this view of the contract. Agents were to have commissions on renewals, as well as on original policies. If the agent were not to receive any compensation for renewals, he would not have the motive to procure substantial and continuously-paying persons to become insured, that he would if he had an interest in the renewals ; and the company would derive correspondingly less benefit from his services. So, if the agent were entitled to commissions on renewals, and at the same time liable to lose his agency at the caprice of the company, without fault on his part, and with that to lose also his claim for commissions on renewals, the same result would follow.

As, in general, policies lapse upon non-payment of the annual premiums, the assured are interested in making such payments promptly. Hence the business of collecting and remitting those sums occupies but little time and requires but little effort. The five per cent. commissions on renewals may thus be regarded not only as compensation for such services, but also as part payment for the more laborious and difficult work of soliciting customers, and procuring the policies to be issued, which is so inadequately and disproportionately remunerated by the commissions allowed for such service.

The defendants recognize this principle in their rule establishing the compensation of agents, which allows agents double the amount of commissions on renewals of policies issued through their instru-

mentality, that it does for the same service in respectured by other agents. This extra allowance is understood as a part compensation for the previous service of securing persons to become insured. The plaintiff's claim takes of the nature of a claim for compensation for while he was the defendant's agent.

By the contract between the parties the plaintiff has a *quasi* lien for commissions on the premiums paid on policies issued through his agency, as a part of the compensation for his previous services. It is obvious that such a claim is not defeated or impaired by a revocation of his authority.

Taking therefore into consideration the nature of the contract to be transacted, the interests to be subserved, and the fact that the parties to enter into the contract of agency, the plaintiff under that contract acquired a right to commissions on premiums paid for the renewal of all policies until the termination of his agency; and that this right attaches as well to premiums paid before the termination of his agency; it appears that his authority ceased without any fault on his part, and he has been ready and desirous "to collect and remit" the commissions on the premiums, less his commissions. This view of the plaintiff's right is confirmed by the usage proved to exist among life insurers in such cases.

The statute of 1870, chap. 156, sec. 8, invoked by the defendant cannot avail them. The plaintiff acquired his right to commissions on the premiums paid on policies issued through his agency before that statute was passed; and it is not competent for the legislature to pass an act impairing plaintiff's right to commissions on the premiums paid on policies issued before the passage of the statute. In my opinion, the entry should be :

Default to stand. Judgment for plaintiff.

## DISTRICT COURT OF THE UNITED STATES,

## SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF

FRANK F. NEWLAND, a Bankrupt.\* }

N being indebted to A for \$4,000, took out a policy of life insurance for this amount in favor of A, and paid the premiums thereon. On being adjudged bankrupt, the cash surrender value of the policy was credited on the debt. On the estate a dividend of 20 per cent. was paid. A kept the policy alive by paying the premiums from her own money. N dying a short time afterward, A claimed the whole amount of the policy, being considerably in excess of her credits.

*Held*, that the court, in fixing the surrender value of the policy at the terms stated by the company, fixed it as it then stood—as a security created and upheld by the payment of the bankrupt's money, and one to which he had given all the value it then had.

*Held*, that the policy, after A commenced paying the premiums on it, was substantially a new security, and when her debts are paid from the proceeds of the policy she ceases to be a creditor.

*Held*, that it was only as a creditor that A had any insurable interest on the life of N.

CHARLES M. EARLE, *for the Assignee.*

JOHN L. HILL, *for the Creditor.*

BLATCHFORD, J.

On the 16th of April, 1872, the bankrupt filed his voluntary petition in bankruptcy, and was, on the 23rd of April, 1872, adjudged a bankrupt thereon. Among the debts proved against his estate was one by Mrs. Lucy Van Antwerp, his mother-in-law, on two promissory notes made by him, without interest, for money loaned to him by her at the dates of the notes, neither of which notes was due. The notes amounted to \$4,000. The proof was for \$3,450, the bankrupt having paid \$550 upon the debt before his bankruptcy. On the 16th of April, 1870, the bankrupt took out a policy of life insurance on his

\* Decision rendered November 21st, 1873.

life for \$4,000, payable to Mrs. Van Antwerp, as collateral security for such debt. He paid the premiums on such policy at the time of filing his petition. Afterward, and to and from the time of the payment of the premium for the quarter year during which the surrender of the policy was fixed, as between Mrs. Van Antwerp and the estate in bankruptcy, as hereafter mentioned, the premiums were paid with moneys furnished for the purpose by Mrs. Van Antwerp. In the schedules to the bankrupt's petition, and in the statement of debt by Mrs. Van Antwerp, the fact that the policy was taken as collateral security for the debt was set forth. Prior to the making of the dividend of the assets of the estate, the assignee and Mrs. Van Antwerp, by agreement, submitted to this court for decision the following questions :

1. Whether the assignee can require Mrs. Van Antwerp to surrender the policy to him and take a dividend on all to retain the policy and withdraw her proof of debt.

2. If such election on her part cannot be required, taken as the value of the collateral security to be deducted from the debt, so as to arrive at the amount on which Mrs. Van Antwerp can receive a dividend from the estate?

The court answered the first question in the affirmative and decided that the value of the policy to be deducted from the debt must be taken at \$13.13, which was the then cash value of the policy on a surrender of it to the life insurance company. *In re Newland*, 7 Nat'l Bank'cy Reg., 477. The \$13.13 was credited to Mrs. Van Antwerp. After making such credit, the debt, less a rebate of interest, was \$3,208.20. On this sum a dividend of 10% was declared, and the amount of such dividend, \$320.82, was paid to Mrs. Van Antwerp, March 18th, 1873. Mrs. Van Antwerp kept the policy and kept it alive by paying the premiums which became due on it. After the dividend was paid, and the death of the policy, the bankrupt died. Prior to the declaring of the dividend, the following questions have been certified for the court's decision :

1. After crediting the \$13.13 upon Mrs. Van Antwerp's account, has the assignee any further estate, right, or interest in the policy? If yea, has he now in the proceeds? If yea, to what extent?

2. In case he has any such rights, is Mrs. Van Antwerp allowed for any, and if yea, which of the following items of interest, or proportion thereof, since her notes became due, (a) premiums furnished by her before the valuation and \$13.13; (c) premiums paid by her after that.

3. Can she, in either case, retain the past and participate in future dividends, or can the assignee require her to withdraw from participation in further dividends.

4. If she is entitled to the whole \$4,000 in the first instance, can she be required to return, or in any way give the assignee the benefit of what has been already credited upon the original debt, viz.: (a) the \$550; (b) the \$641.64 received by her as dividend.

It is contended, for the creditor, that the policy is her absolute property, subject to no equity of redemption by any person; that the value of the policy was fixed, and deducted from the debt; that thereby the policy became the property, with liberty to her, if she chose, instead of surrendering it and receiving its surrender value, to keep it alive by paying premiums, and receive to herself its fruits; that the right of the assignee in the policy ceased, on its being so valued, and could not be revived by the fact that she chose to continue to pay premiums, when it never could have been revived if she had chosen to surrender it and receive the \$13.13; that the policy would have been worthless at the death of the bankrupt, had Mrs. Van Antwerp not paid the premiums; that she took the risk and is entitled to the profit of the investment, and that the question of the value of the policy as against the assignee is *res adjudicata*, and cannot be opened.

[Concluded in December Number.]

## MISCELLANEOUS DEPARTMENT

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### LIABILITY OF NORTHERN LIFE INSURANCE CO ON SOUTHERN POLICIES LAPSED DURING THE WAR.

In the Circuit Court of the United States, for the Western District of Tennessee, has just been decided a very important case, *Tait et al., heirs of Doctor Samuel Bond, deceased, vs. New York Life Insurance Company*—which greatly concerns all life insurance companies doing business in the Southern States before the war. The case is still more interesting for the vast amount of legal research which it displays, and the opinions expressed on numerous questions respecting a life insurance policy.

The facts, upon which the principal questions of law rest, are as follows: Dr. Samuel Bond, in 1854, procured a policy of life insurance from the defendants, the New York Life Insurance Company, for a sum of \$5,000. Dr. Bond continued to reside in the State of Tennessee till the date of his death. The policy provided that the insured "shall not pay the said premiums on or before the expiration of the days hereinbefore mentioned for the payment thereof, then, in every such case, the said company shall not be liable for the loss of the sum insured, or any part thereof, and this policy shall be void and determine." The annual premiums were duly paid by the deceased to J. B. Kirtland, the local agent at Memphis, and including the year 1860; the last payment being made in the month of that year. Kirtland continued to act as the agent of the company at that point until some time in July or August, of 1861, when all intercourse between the people of the State of Tennessee and those of the loyal States was cut off by the breaking out of actual hostilities; whereupon he ceased to act further as agent, and has never since acted in that capacity. On or about the 17th of October, 1861, a tender of the premium due in the year 1861, made, on behalf of the insured, to the former agent, Kirtland, was refused. Kirtland then had no receipts for the



mium, signed by the home officers of the company, in his possession. The officers of the company had no knowledge of the tender until after the death of Dr. Bond, nor did they ever communicate with Kirtland in reference to the same. The powers and duties of the agent sufficiently appear in the opinion of the court. This suit was brought in October, 1869, to recover the amount of the insurance, less the unpaid premiums.

Mr. Justice Emmons in rendering the opinion of the court, shows in the first place that it was absolutely necessary for the company, in order to do business in the Southern States during the war, to have not only the continuous active efforts of the agents, but also constant communication across the hostile lines. All receipts declare that no payment is good unless the party who claims the right to accept it holds an authenticated form, signed by the vice-president or secretary, which necessarily must be transmitted from the home office. This precaution is necessary to the prosecution of the business, and is so dependent upon the regular communications between the agent and the officers, that when the latter are interrupted, the payments, without an alteration in the contract, cannot be made. Should the company fraudulently or negligently omit to forward the annual receipt in violation of its duty under the policy, different principles would apply.

Although some of the lower courts have shown a disposition to refuse the application of old and familiar doctrines to the exigencies of the late contest, there does not appear to be any disposition on the part of the Supreme Court of the United States to relax that portion of the laws of war which affects the contracts and business relations of belligerents. Believing there is no judicial authority anywhere, to so far modify the law as to preserve in force this contract, the court holds it was abrogated the moment the insured and insurer became public enemies.

The principle that contracts, the continued execution of which, during belligerency, is opposed to national policy, are abrogated by war is universally conceded. The national policy would be violated by the making, or the continual execution of, any contract which directly increased the material prosperity of the enemy. Differences of opinion only exist in reference to the application of this rule to policies of insurance on the life of a public enemy, and not to the validity of the rule itself.

The two main proportions on which this controversy turns are: *First*, is the continued execution of a life policy inconsistent with

political interests? *Second*, is the payment of the premium during war a condition precedent to recovery? These two questions are all that is material to this decision.

The general rule is, that all contracts and intercourse of every description are prohibited during war; and that those agreements, the execution of which increases the power of the enemy, are wholly annulled, and the parties reciprocally discharged from their performance. This generality would include the contract before us. But exceptions have been created to its application, and within these it is contended this case comes.

By the exceptions which are given, based upon *Deniston vs. Indria*, 3 Wash. 396, and *Ward vs. Smith*, 7 Wall. 447, it is held that debts are suspended, not discharged; but this is not a debt. Where the consideration has been received and the obligation to pay is complete, no new act or volition is necessary. By suspending these, the debt without national injury remains. But under a policy of insurance, when in force, the most continuous and intimate business relations and intercourse are indispensable. The business of the home office, extending through distant States, requires constant communication with the agents, both while the policy is in force and also when death occurs, to show that the terms of the policy have been kept inviolate. It is simply monstrous to suppose that the loyal members of this great scheme are compelled by law to confide this delicate function to a public enemy, who is to exercise it in favor of his fellows in rebellion.

These forms and duties of the several members and the company are well understood by the parties, and constitute a part of the contract between them, and are intended to be specifically and exactly performed. They cannot be so performed without much intercommunication across the lines. To dispense with them is to change the whole nature of the scheme, and involves an unprecedented and wholly unwarrantable interference with the substantial terms of the agreement.

The question now remains whether the rule which requires the suspension of debts, and the limitation which exempts them, is applicable to the exigencies of the present record. Does this present a case analogous to a complete existing debt, or does it constitute an executory contract, the continued performance of which during the war has so often been declared unlawful? The court claims that what is historically established, brings the contract before it within the rule which abrogates the contract. A leading, if not the most important

motive for the prohibition, is to prevent the increase of the material power of the enemy. While the whole power of the nation is exerted to cut off their supplies, and reduce to want and suffering the entire hostile nation, it would be absurd to suffer it to be counteracted by allowing its subjects to perform agreements which would produce or increase what it is endeavoring to destroy ; and this we understand to be the essence of the rule.

The fact that this agreement was entered into before hostilities, is immaterial to the argument. A northern citizen engaged in the manufacture of any article useful to the enemy during the war, and bound by executory contracts, could not lawfully carry them on during hostilities. His business cannot be lawful if the products of it become the enemy's property.

A marked difference in the relations existing between enemies under this policy of insurance and those of ordinary debtors and creditors is, that in the latter obligation is full before the war. No new value or source of credit is placed in the hands of an enemy during its progress. Here, no obligation whatever exists, but a debt is created by much mutual activity and elections between the parties. A source of credit, and a power of purchase with its proceeds, is thus originated. A value is created, which would have had no existence in the hostile country but for the action of one of the very enemies whose government has the power of seizing it. In the instance of a debt paid over to a local agent, no increased obligation, or value of any kind, is subordinated to the hostile State. The debt is equally in its power, whether in the hands of a debtor or paid over to the agent. The debtor only is changed, both residing in enemy's territory. They are so wholly unlike in their circumstances and in practical, financial results, that the same rule should not be applied to each.

The accident in this case, that the rebel government did, in fact, confiscate all debts due from loyal citizens, would render the payment of these premiums unlawful, even if it be conceded that, had a different policy been pursued, it would have been otherwise. When the act of an enemy creates a value which, *eo instanti*, passes to the enemy's treasury, that it does so is an additional reason why it is unlawful to continue the agreement under which it took place.

Another reason urged by the plaintiff is that the sum insured will not be paid till after the return of peace, and therefore will not furnish material aid to the enemy. But a thousand policies due against solvent companies are among the most certain sources of fu-

ture payments which could be placed in the hands of our enemies. It is singular that this fallacy should be reproduced after being overruled again and again in a series of judgments which hold that marine policies are annulled by hostilities.

In three of the English judgments hereinafter cited this argument was made in bar, and it was answered by the court that the obligation was a present capital in the hands of the enemy. And it was upon this reason principally that the judgments were rested. The leading idea in all these instances is *benefit to the public enemy*.

Subject-matter of insurance in case of loss is of comparatively little consequence. Whether the insurance be upon ships, upon mills and manufactories in the enemy's territory, or upon the life of a non-combatant; and whether the property and life is destroyed by fire, tempest, or the casualties of war, through raids or sieges; the same sums, in precisely the same legal conditions, pass from the hands of loyal citizens to public enemies. It is impossible to discern, practically or legally, the slightest difference. A recurrence again to the judgments in reference to maritime insurance will show that this whole subject is fully discussed and actually decided, and that it is not *dictum*, as it has so repeatedly been said to be. The point was made, that the policy was not necessarily void in all instances, as the subject of insurance might not be captured by the government, but might be destroyed by the accidents of navigation; and that although it might be impolitic to suffer the enemy to be reimbursed for an injury produced directly by the war, the reason did not apply where it happened from those casualties insured against in time of peace. The reply was, that it was unlawful for a loyal subject to continue to stand guaranty for any loss or damage whatever of a public enemy during war; and that the policies were annulled, no matter what might be the cause of loss.

And we say here as we have said in reference to another point, that what was lawful in a certain war might be unlawful in another, depending upon the policy of the government which waged it. Where both governments resorted to confiscation, and each laid waste the territory of the other, it is a mere distinction in words without any practical difference in actual condition, to say that a maritime policy is annulled, and one upon inland property or upon the life of a non-combatant continued.

In the leading authors and judgments which we shall examine, and in view of the fact that great prominence in modern criticisms has been given to the fact that the earlier judgments referred to contracts

involving international intercourse, some pains will be taken to show that this is not a material feature.

This argument derives importance less from its real nature than from the accident that it seems to be conceded that if all agreements, irrespective of intercourse, are unlawful between belligerents, then these life policies should not be continued by payment of premiums during the war.

The most full consideration of the general subject of the illegality of contracts between belligerents to be found in any one adjudication, is the opinion of Kent, chancellor, in *Griswold vs. Waddington*, 16 John's, 438. Its doctrine that all agreements made during war, and the continued execution of those which are executory made before, are unlawful, which had been repeatedly announced in anterior Federal judgments, is reproduced in his Commentaries, Vol. I, Part I, Sec. III., and cited with approbation by every prominent English and American writer upon international law since its delivery. We think we may successfully challenge the citation of a single criticism upon its accuracy, by either author or judge, until the recent decisions in reference to life insurance. It has been accepted as American common law from the day of its delivery down to the recently attempted revolution. Even upon the supposition that some portions of the elaborate treatise contained in his judgment were *dicta*, its conclusions have so influenced professional and judicial opinion as to constitute it a high authority, irrespective of the facts which produced the judgment. See 2 Brod. and Bing., 598, per Lord Eldon, and 15 East., 225, per Lord Ellenborough.

The court examines with considerable fullness the case of *Griswold vs. Waddington*, cited above, and reproduces its arguments and citations. It calls attention to the features of this judgment on account of the recent decision of *Kershaw vs. Kelby*, where many of its doctrines, and those of similar import, declared by the Circuit and Supreme Courts of the United States, are denied and said to be chiefly *dicta*. The court does not so read the judgment, but considers it pointedly, deciding that all contracts voluntarily made with an enemy during war are void for illegality, and that all such as involve the continuance of any active business relation, or of continuing responsibility for acts or losses of an enemy, are dissolved by war.

The court, in this very learned opinion, reviews the earlier writers on international law, and concludes this part of the argument. Every elementary writer, by his analysis of judgments and his modes of announcement, assumes as settled law, that all contracts, save for ne-

cessaries and ransoms, are illegal between enemies ; and the cases of marine insurance are but instances of the application of the principle. That there is anything in their nature distinguishing them from transactions on land, or contracts made within a hostile country, the effects of which are to increase the resources of the government, is nowhere hinted at. This idea is found solely in a few modern judgments which have upheld contracts for ransom in the enemy's country, and the continuance of life policies.

With this long line of adjudications establishing the doctrine of such a continuing contract, and such relations as this mutual contract creates, are abrogated by war, and after the correctness of this doctrine has been asserted by every elementary writer who has written upon the subject, and so often announced by the court of law which is to review our judgment, we have no doubt about our right in rendering judgment against the plaintiff. We should have done so even though we perceived more reason and justice in the actions which oppose our own. But after the most painstaking consideration of them, and after having given the cause far more consideration than our time permits to most cases, we are with much reluctance constrained to say, that neither their conclusions nor the grounds upon which they rest commend themselves to our judgment. In respect, therefore, of the points hereafter considered, we deny a recovery in this case, upon the sole ground that the contract became unlawful, and was discharged the moment the parties became public enemies.

It is a distinct ground of defense in this case that the payment of the premium on the day is a condition precedent, and that in view of the illegality of continuing the indemnity after hostile performance became void by non-performance of this condition. Reference will be made to cases which announce the old and established rule, that a condition precedent must be performed in order to furnish grounds for recovery under the contract, only to show that the circumstances relied upon to take this case out of it, at least in most ordinary administration. Impossibility of performance arising out of unanticipated exigencies, constitute no exception to the operation. Bliss on Life Insurance, pp. 253-274, fairly states the leading American and English cases, stringently applying the rule that a payment is a condition precedent. *Roberts vs. N. E. M. Co.*, 1 Disney, 385 ; *Bergson vs. Builders Ins. Co.*, 38 Cal., 541 ; *Stanton vs. Insurance Co.*, 36 Conn. ; *Sheridan vs. Phoenix Co.*, 8 of Lords Cases, 745.

It is optional with the insured whether he will continue the policy, and this is an additional and conclusive reason why it must be terminated by his failure to pay on that day. For those who have *died*, representatives claim compensation; while hundreds of those who *survive* refuse to continue because they can do better by a new insurance. This company would, beyond all doubt, be quite willing to pay for all who are dead, if all those who survive would pay up back premiums, thus carrying out the scheme according to its intention and financial theory, and affording a fund to pay the losses. In 4 Vroom, N. J., 487; *Oatir vs. The American Life Ins. Co.*, the court approbates the provision avoiding the policy for non-payment, and the rules of law applicable to it, as eminently just and necessary for the safety of the company and of the public which relies upon its solvency and punctuality.

Some of the judgments relied upon by the plaintiff decide that if the war rendered the payment of premiums impossible, such a fact constitutes an *excuse*, and that a subsequent tender authorizes a recovery. There are but few cases where subsequent impossibility is an excuse, even where it is relied upon only as a defense. And there is a broad difference, both at law and in equity, between protecting a defendant from an action for damages, and authorizing him to recover against another, where, in like circumstances, he has failed to perform a condition precedent on which his right of action depended. And still wider is the distinction where the condition is *optional*, the agreement, so far as this feature is concerned, unilateral, and the damages dependent upon some act to be performed at the election of the plaintiff. Before 20 Grattan and 9 Blatchford, we know of no judgment or elementary book which suggested there could be recovery in such case. 2 Pars. on Contracts, 672, says, no degree of mere *hardship* will satisfy the rule that the act of God rendering performance impossible is a defense. And in no case is impossibility an excuse, if it refer solely to the personal disability of the promisor, there being no natural impossibility in the thing. See *ibid.*, 459. The cases which establish and apply this rule show most clearly that far greater effort is demanded from the promisor, than that of requiring the insured to leave the rebel region and come within the loyal lines, if he wishes to continue the indemnity; and quite as clearly that it is no answer to say that in the accidents of his personal circumstances he was unable to do so. The following American judgments are fully sustained by the English cases they cite and approve. *Thompson vs. Dudley*, 25 N. Y., (11 Smith,) 272; *School District vs.*

Daneby, 25 Conn., 530 ; Trustees vs. Bennett, 3 Dutcher, N. J., 514 ; 19 Pick., 275, Adams vs. Nichols. In Dermot vs. Jones, 2 Wall., 1 ; Bullock vs. Dommit, 6 T. R., 650 ; Brecknock Co. vs. Pritchard, *ibid.*, 750 ; Beebe vs. Johnson, 19 Wend., 500 ; Beal vs. Thompson, 3 B. & P., 420 ; all extreme applications of the rule are cited and approved ; and the following remarks made by Justice Swayne : "The principle which controlled these cases rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for dispensation, the rule of law can give none." He says that in *such cases equity will not interfere*. The fact that in this case recovery was had upon the common counts when the defendant had received and occupied the house, in no way qualifies the principles we have quoted from the judgment. And see Chitty on Cont., 734 ; 8 T. R., 259 ; Ang. on Carriers, 294 ; 3 Burrows, 1637 ; 4 Wheat., 204 ; Co. Lit., 206 b. ; Shap. Touch., 164 ; Harmony vs. Bringham, 12 N. Y., 99 ; Oakley vs. Minturn, 11 N. Y., 25. The case before us is one at law, and even if, in an extreme case, equity would relieve, there can be no pretense that in this action an excuse can be accepted by the court in place of performance. The contract in this case, in the most unambiguous terms, declares the premiums must be paid on the day or the policy is void. There is no exception of difficulties or impossibilities. The agreement is absolute in terms ; and the nature of the scheme and the presumed intentions of the parties leave no room for the slightest doubt that they mutually *intended* its literal enforcement. It bears no possible analogy to the cases of forfeitures and penalties intended to secure acts and payments, where time is not of the essence of the contract.

Before the recent decisions cited by the plaintiff, we find no case or author suggesting that a complainant in a court of equity is entitled to relief where he has failed to comply with conditions precedent, which he was under no obligation to perform, and the contract was in that regard wholly unilateral. Much less have we been able to discover a single instance of interference where the agreement is in common use, and punctuality is well understood to be of its essence. The distinction between enforcing a right dependent upon conditions, and protection from penalties intended to secure collateral payment, we do not know to have been disregarded in any other judgments.



The true nature of the agreement, which we think is wholly overlooked in the recent judgments, is stated, and attention called to the fact that for a few hundred dollars the company was called on to pay \$8,000. This would be *just*, if demanded in the conditions upon which alone it was *agreed to be paid*. But we submit that it would be alike unjust and demoralizing to the law to decree its payment by making in effect a new agreement for the parties. The risk which is run by the company is a *full*, meritorious, and solid consideration for the premiums already received. Some of these judgments speak as if financially this element of consideration was not known to the law ; or if so, only as a technicality without substantial value. None stand higher, or receive fuller protection, both at law and in equity. The latter courts are full of illustrations of withholding relief where parties have had the *benefit of chances*.

Time is always deemed of the essence of the contract where its subject varies in value, or the motives and the interests of the complainant are subject to change. *Dolerent vs. Rothschild*, 1 Sim & Stroeter, 590 ; *Stubbs and Sylvester*, 1 Young & Coll., 94.

If this contract were an isolated transaction between individuals, a court of equity would refuse to enforce it against the obligor as unconscientious. See *Story's Eq. Jur.*, § 331, etc.; and *Fry on Specific Performance*, § 203, *et seq.* The judgments on this subject abundantly demonstrate that equity would afford no relief in the enforcement of such an agreement, where the complainant for a few hundred dollars asked as many thousands. The contract becomes just and moral only when it becomes a part of a great system, and rests upon the average of many thousands of lives. The only rational mode of contemplating the transaction is to consider all those who live in the loyal States as an aggregate, insuring all those in the disloyal, and to administer such a rule as would do justice generally between the two classes. The 50 N. Y., 9 *Blatchford*, and their associate judgments, decide that the body of members who punctually pay shall remain liable to such portion of those who do not pay, as happen to die within the period of suspended payments, while they have not a farthing of claim on that great mass of other delinquents who outlive this period, and refuse to pay their premiums after the war. The financial consequence is identical with that which would result from a deliberate selection and insurance by the officers of the company, of a given number of lives which they knew would terminate within five years, and a rejection of a still larger number

which it was known would pay premiums for an indefinite period.

The entire scheme depends upon the assumption of what to be true, that a small number only would die within a short while the far greater portion will live and pay premiums to a relatively advanced age. The modern judgments cut the matter in two, and say to all those who are public enemies, "None can pay your premiums as provided in the contract, but those who happen to die are entitled to the full sum insured, deducting the premiums, while not one of your fellow enemies is called upon to contribute a dollar for this purpose. The money shall be paid to the loyal citizens alone." The disastrous effects of such a rule upon a mutual insurance company, and the vital importance of the prompt payment of premiums by all for whom they are insured, will appear by a simple statement. Out of a given number of insured persons, statistics show that there will be on an average a certain proportionate number of deaths each year; and in the present scheme the premiums to be paid each year by the whole number insured are fixed at such an amount as will make their sum sufficient to meet the losses arising from the average deaths each year, and to provide for unforeseen fluctuations of the average and other contingencies, including necessary expenses. If time were thus held not to be of the essence of these mutual insurance contracts, it is difficult to see how a mutual company could escape ultimate if not speedy bankruptcy. No one knows what the law would pay a single premium after the first, but it would depend; and if he chanced to die within the time when the sum insured to him would exceed that of his unpaid premium, his representatives would demand that excess; otherwise he would have no policy, thus securing to himself all the benefit of his insurance until death, while the company have no benefit of his chances of death during the first year. There is but little significance in a name; but the idea of the result of such a rule of law is expressed by the term rank injustice rather than the beneficent and kindly intervention of a court of equity to prevent wrong. We have no doubt that this a bill in equity seeking relief from the consequences and impediments created by the war, as possibly it may be claimed that relief could be given. For a greater reason must judgment be guided in this action at law.

The most extraordinary feature of the opinion in *9 Blanton vs. Ins. Co.*, and affording a remarkable illustration of

ties which learned judges will take with fixed rules of law when they stand in the way of what they deem the merits of a just cause, is that part which attempts to answer the forcible objection, that the continuance of an agency to receive premiums became unlawful for the reason that the instant he received them they were, by operation of the local law, confiscated by the rebel government. With much spirit of expression he declares this is no objection at all, because the agent could refuse the tender, and thus prevent the creation of a debt which the rebel government could seize. The opinion concedes that all agencies, the duties of which cannot be performed without a violation of political duty, are abrogated. When pressed with the fact that the duties of this one came pointedly within the principle, and asked to apply it in justification of its discontinuance, he replies: We will continue the agency, but avoid its illegality by a suspension of its functions. This is no distortion of the position, but almost its literal reproduction. The mind which was forced to resort to such an answer must have been close to the line which separates its judgment from our own. And this, too, is said in an opinion which holds the removal of the agency a fraud which estops the corporation to deny its continuance.

We are unable to appreciate the argumentative effect which the opinion imputes to the facts that a local statute demanded an agency, and that the policy constituted a Virginia contract; although these features seem to constitute leading reasons for giving judgment for the plaintiff. If the continuance of the contract is against public policy, it is wholly immaterial which it was made. If the functions of the agent could not be lawfully exercised, it is of no consequence that he was originally appointed by the compulsion of the statute. It seems to us that the only important inquiry, viz., "Are the substantial relations existing between the parties such as war dissolves?" is overlooked.

Judgment must be rendered for the defendant with costs.

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#### BOSTON A YEAR AFTER THE FIRE.

The anniversary of the great fire in Boston, on the 8th of November, was an occasion of celebration by the city officials. The time which has elapsed since that great disaster has enabled the public to estimate the losses sustained, and to form some idea of the future

appearance of the burnt district. When the people came up their losses, it was found that 776 buildings had been destroyed, that some of the richest and finest business streets were annihilated, and the total loss incurred was not less than \$75,000,000. In the years after the catastrophe, the majority of these buildings are replaced by larger and better structures, the streets have been widened and improved, and the valuation of the city has greatly increased. In the improvements in the burnt district, the other improvements, commenced before the fire, have been prosecuted with unabated vigor; and the poor among the sufferers were wholly sustained by home charity.

In regard to the quality of the buildings, in spite of all that has been said and written against them, the fact is very evident that as a class, they are much better and safer than before. They are built in a more substantial manner, and of more enduring materials. Although there are as yet no absolutely fire proof buildings, several are contemplated, which will be used for banking and insurance purposes, and will be thoroughly fire proof, without great cost. Among these will be the three great life insurance companies erected on Milk Street—those of the Mutual Life and Marine Insurance Companies of New York, and the New England Mutual Life of Boston.

The style of architecture is also greatly improved, and many who have had ample opportunity of judging declare that "Boston now shows a larger collection of beautiful buildings than any other city in the country. The Mansard roof has not been abandoned, but is composed of iron and brick with slate and metal finish, therefore regarded as quite as safe as flat roof. The materials used in the construction of these buildings present a great variety. A majority have stone fronts while many of them are of brick and iron. The great variety of style and the rich designs in architecture produce some of the finest results ever seen in this country.

The prompt settlement of the insurance losses has had so much to do with the rapid rebuilding of the city. Of the fifty-six companies of insurance within the limits of the fire, about sixty-six per cent have been paid. The list of the losses of fifty-two Massachusetts companies amounts to nearly \$35,500,000 and their assets to \$23,500,000, leaving a deficit of about 34 per cent. The Massachusetts companies have all taken advantage of the provisions of the General Insurance Law, passed at the special session of the Legislature in 1872. Many of these have been reorganized with a slight change of name.

those which went into the hands of the receivers. Among the prominent measures effected by the Legislature at the extra session, were those relating to the standard form of an insurance policy, the General Insurance Law, and the limitation of fire risks in cities.

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## MISCELLANEOUS.

### THE COLVOCORESSSES CASE.

As already stated, the most important case expected to come before the Superior Court of Litchfield, Conn., at the November term, is that of the Colvocoresses estate against the Phoenix Mutual Life Insurance Company of Hartford, for the payment of two policies of \$10,000 each in that company, held by Captain Colvocoresses. An eminent array of counsel will appear on either side in this case, including for the estate Gov. Ingersoll, of New Haven, and the Woodruff Brothers and E. A. Seymour, of Litchfield; for the company, Hon. R. D. Hubbard, of Hartford; Judge McCurdy, of Lyme; Judge Foster, of Boston, and H. B. Graves, of Litchfield. Of the plans of the defense, the *Hartford Post* speaks as follows: "The counsel for the defense have been hard at work for some months, preparing the evidence to make good their claim that Captain Colvocoresses committed suicide. They rely, of course, entirely upon circumstantial evidence, but have prepared a strong case. They will claim that the company should not be compelled to pay the money, inasmuch as the insurance was obtained with a fraudulent design, namely, that of securing the money for his family by committing suicide. They have an immense amount of evidence substantiating this claim, but rely principally on two facts:

First, that he had no means of carrying—that is, paying, the premium on \$175,000, (the total of his insurance,) and, in fact, had never paid but a small portion of the amount due. To this it is expected that the plaintiffs will say that he, Captain Colvocoresses, had money, and, in fact, when he was murdered he was going to New York to deposit some bonds with J. J. Cisco & Co. They claim that a memorandum which Captain Colvocoresses had, showed that he had these bonds. Just here the counsel for the company expect to put in their strongest evidence, taking the plaintiffs upon their own ground. It appears that upon the memorandum made by the Captain, was a minute of a certain amount of Connecticut Valley Railroad bonds, twelve in all, which he claimed to have. The counsel for the defense, taking this memorandum, have worked upon it, and with the most remarkable results. It is said that they have traced every bond, from the time it left the office of the railroad company up to its present holder, and are armed with dispositions in every case. They claim that they will show, after a few more dispositions are concluded, which are now being taken in Washington, a complete history of every bond, from No. 1 up to the highest number issued, and that not one of these Connecticut Valley bonds ever found its way into Captain Colvocoresses' possession at any time. Fortified with this remarkable testimony, in opposition to the plaintiff's claim, the defense expect to prove, from inference,

involves the question, whether the extensive alteration of a building without notice to the company vitiates the policy :]

The plaintiffs are the trustees of the mortgagees of the Hyde Chymical Company, formerly a manure company, but now carrying on the business of the distillation of gas tar, and the manufacture of naphtha, creosote, carbolic acid, and other products of tar, and they brought this action on a policy of insurance issued by the defendants to them, insuring their premises against fire, to the amount of £3,000, in respect of the destruction of their works by fire on the 4th of November, 1872. The plaintiffs first endeavored to insure with the Yorkshire Insurance Company, but that company declined the risk, and they then got into negotiation with the English Insurance Company, and after the works had been surveyed by that company's surveyor, an insurance was effected for £3,000, at a premium of about £1 3s. 6d. per cent. In the course of 1870 the business of the English company was transferred to the defendants, and at Lady-day, 1871, the policy was granted upon the old terms, and without holding another survey, upon the renewal of which, in 1872, the present action was brought. The same agent negotiated and received the premiums upon these different policies, and earned his commission in respect of them. The policy contained a condition to the effect that any alteration made in the property insured after the insurance whereby the risk was increased, without the consent of the company indorsed upon the policy, should avoid it, and upon this condition the case turned. At the time of the first policy with the defendants' company, Lady-day, 1871, and until March, 1872, the works contained only four stills for distilling the tar, and there were no "coolers" to receive the pitch which resulted from the process, but it was run straight off through pipes into

the pitch pits prepared to receive it. There was also a shed in which no process of manufacture was carried on, but which was used merely as a warehouse of combustible materials. In the interval between March, 1872, and November, the date of the fire, in anticipation of larger manufacturing requirements in the winter, by reason of having got the contract with the Corporation of Manchester for the whole of its gas tar, the distillation of which would, the plaintiffs stated, commence in the winter, the shed was pulled down, and six new stills were erected on the site of it, and a closed iron tank, termed a "cooler," was provided, both in connection with the four old stills and the six new ones, for the purpose of avoiding the nuisance—and the plaintiff said the danger—of the hot pitch being exposed to the open air, and giving out vapors in running from the stills to the pits. The plaintiffs' case was that although these alterations and additions were made before the date of the fire, and without notice to the company, they did not increase the risk, because only the old number of stills—namely, four, were at work at one time, and the effect of the "coolers" was to diminish rather than increase the danger. Besides the evidence of Mr. Anderton and of the secretary to the plaintiffs' company, two agents of the Yorkshire Insurance Company stated that in their opinion the risk was not increased, and that they would have insured the premises upon the old premium, notwithstanding the alterations. The origin of the fire was said to have been the negligence of a workman in lighting the tow (which, steeped in creosote, is wrapped round the taps, through which the pitch has to be run, and is set fire to in order to keep the pipe heated and the pitch liquid,) on the tap of one of the stills while the pitch was running from a neighboring still, and fire was thus communicated to

va. The Mutual Benefit Life Ins. Co., 31 Iowa, 216; Franklin vs. Atlantic Fire Ins. Co., 42 Mo., 456; Columbia Ins. Co. vs. Cooper, 50 Penn. St., 331; Manhattan Ins. Co. vs. Webster, 59 Penn., 227; Ins. Co. vs. Wilkinson, 13 Wall., 222.

*American Central Ins. Co. vs. McLanathan.\**

Rep'd Jour'l, p. 307.

KAN. S. C.

#### AGENCY.

§ 194. *LIFE.—No Commissions on Renewals after the Agency has ceased.*—The plaintiff having been an agent for the defendant, claimed a commission on the renewal premiums of policies which were solicited by him, which claim was denied by the defendant, as the agency was liable to be determined by the pleasure of either party to the contract. *Held*, that the terms of the contract imply a continuance of the agency, and when when one ceases to be an agent, he cannot rightfully collect and can have nothing to transmit. *Held*, that there is no custom established among insurance companies doing business in Maine, to pay to persons who have ceased to be agents commissions on renewal premiums of policies which were originally procured by them.

*Spaulding vs. New York Life Ins. Co.†*

Rep'd Jour'l p. 353.

ME. S. C.

#### APPLICATION.

§ 195. *LIFE.—False Statements in Application affecting the Contract—Opinion of either Party—Degree of Truthfulness required.*—*Held*, that the opinion of the president of the company as to the truthfulness of certain statements made in the application, or what he would have done under certain circumstances, had no bearing on the case, and was properly rejected. *Held*, that it is a question of law for the court, and not to be settled by either party, how far false statements in the application affect the validity of the contract.

Campbell vs. New England Mutual Life Ins. Co., 98 Mass., 402; Miller vs. Mutual Benefit Life Ins. Co., 31 Iowa, 232.

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\* Decision filed August 15th, 1873.

† Decision rendered ———.

licy, as a collateral security for the debt, was set forth. Subsequently, the question being submitted by agreement, the court decided that the cash surrender value of the policy at the time of bankruptcy should be deducted from the debt due to A, who kept the policy alive by paying the premiums as they became due. N dying soon after, A claimed that the whole amount of the policy was her property, that the value of the policy had been deducted from her debt, that she took the risk of paying the premiums as an investment, and that the value of the policy, as against the assignee, was *res adjudicata*, and could not be opened. *Held*, that the court in fixing the surrender value of the policy, fixed it in reference to its value as it then stood, and the policy was admitted for the total value it had then acquired, and that the determination of the relations between the estate and the creditor proceeded on the further basis that the policy was to be surrendered, and then to cease. *Held*, that the policy was continued by A solely as a security for her debt. *Held*, that A, by paying the premiums on the policy as they became due, created a new security in addition to the cash surrender value. *Held*, that before a second dividend was made A should credit on her debt all that she realized on the policy after deducting the premiums paid and interest, and when her debt is paid she ceases to be a creditor. *Held*, that it was only as a creditor that A had any insurable interest in the life of N.

*In re Newland, bankrupt.\**

Rep'd Jour'l p. 895.

U. S. DIST. C.

§ 198. FIRE.—*Set-off—Mutual Debts and Credits.*—Plaintiff borrowed money of an insurance company, but before the time of payment the company became insolvent, and a decree of bankruptcy was entered against it. *Held*, that under the twentieth section of the bankrupt law he can set off, as against this debt, claims for the amounts due on policies of insurance issued to him by the company, although this would give him a preference over the other creditors. *Held*, that this was a case of mutual debt and credit within the meaning of this section. *Held*, that in this case the money loaned not being due at the time the bill was

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\* Decision rendered October, 1871.



another, made long after the application and the contract, cannot be received in evidence as against the assured to impeach the truthfulness of the application.

*Rawls vs. The American Life Ins. Co.*, 36 Barb., 357; *do.*, 27 New York, 282; *The Fraternal Mutual Life Ins. Co. vs. Applegate*, 7 Ohio St., 292.

*Held*, that in the cases where declarations made intermediate between the application and the contract were properly considered as a part of the *res gestæ*.

*Averson vs. Lord Kinnard*, 6 East. R., 188; *Kelsey vs. Universal Life Ins. Co.*, 35 Conn., 225.

The application being set forth in the answer, *Held*, that the court below did not err in striking out a copy of it in the evidence, and also a statement of the manner of transacting business in the home office.

*Washington Life Ins. Co. vs. Haney*.

—4 195.

## FRAUD.

§ 205. LIFE.—*Fraud may be proved by Direct or Circumstantial Evidence—Collusion with Agent.*—Defendant procured a policy on the life of his wife, who, when insured, was suffering from a cancer on the breast. The loss was paid before the company was aware of her condition. Plaintiff brought a suit in the court below to recover the amount on the policy and damages, and was nonsuited. *Held*, that to enable the case to go to the jury, it is sufficient to establish the fact that the policy was procured by fraud, and this may be done by direct or circumstantial evidence. *Held*, that if the husband procured the policy on the life of his wife by fraudulent means, she cannot retain the benefit of it, and he be relieved of the fraud by which it was obtained. And he occupies the position of claiming to keep money, as her representative, which he procured as her agent.

10 N. Y., 345; *Graves vs. Spier*, 58 Barb., 349; 25 N. Y., 600; 26 N. Y., 509; 28 N. Y., 390.

*Held*, that if the medical examiner of the plaintiff, the husband, and the insured, knew that the latter had an incurable disease, and acted in concert in procuring the policy, the plaintiff is en-

1437 ; Smith vs. Hill, 8 Gray's R., 572 ; Hilliard on Bankruptcy, 224 ; Avery & Hobbs on Bankruptcy, 157 ; Waterman on Set-off, 141.

*Held*, that notwithstanding these two exceptions of the twentieth section, the bankrupt law did not intend to foreclose a court of equity from disallowing a set-off when it would, on the whole, work injustice.

*Hitchcock vs. Rollo*. \*

Rep'd Jour'l p. 937.

U. S. C. A.

## STATE LAWS.

§ 212. **MARINE.**—*Contracts of Insurance made in Violation of State Laws, Void.*—The appellants, not being authorized by law to do business in the State of Kentucky, brought suit to recover against the appellee the amounts due on certain notes which Wayley, an accredited agent of the appellants, or a mere insurance broker, had taken for premiums on policies delivered to the appellee. *Held*, that the contracts were in violation of law, and could not be enforced in that State. *Held*, that the legislature had power to prescribe and regulate by law the terms and conditions upon which insurance companies of other States should be allowed to do business in Kentucky, and also to make the business of such companies as disregarded the law, to be wholly unlawful.

*Lindsey vs. Rutherford*, 17 B. Munroe, 245 ; *Chitty on Contracts*, 419.

*Franklin Ins. Co. et al. vs. Louisville and Arkansas Packet Co.* †

Rep'd Jour'l p. 937.

KY. C. A.

## SUICIDE.

§ 213. **LIFE.**—"Sane or Insane."—Deceased took out a policy of insurance for the plaintiff's benefit with the defendant. He stated in his application that there were not any circumstances which rendered him peculiarly liable to accident, and that he belonged to the preferred class of risks. Insured was found dead in a river near a railroad culvert, with a wound in his head. A post mortem examination showed that his heart was enlarged.

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\* Decision rendered June Term, 1872.

† Decision rendered September 3rd, 1873.

to a dividend; and that Mrs. Van Antwerp took nothing but the right to keep the policy alive, and to be paid in full out of its proceeds, coupled with the obligation to pay to the assignee the surplus of the proceeds over the amount of her debt.

I am of opinion that the position taken by the creditor is not sound. The court, in fixing the \$13.13 as the value of the policy, fixed it in reference to its value as it then stood, as a security created and upheld by the payment of the bankrupt's money, and one to which he had given all the value it then had. The determination of the relations between the estate and the creditor proceeded on the further basis, that the policy was to be surrendered and was to cease. Since that, the creditor has kept the policy alive. But she has done so as a security for her debt. It was only as a creditor that she had such an interest in the life of the bankrupt as to make it possible for her to have an insurable interest under the policy. The policy was taken out as such security and has been continued as such security. It is not, however, now, and was not, when the bankrupt died, the same security which the court fixed the value of, and applied on the debt, at \$13.13. That value was merely the then value of the investment of the bankrupt's money. The policy now is substantially a new security. It stands as if Mrs. Van Antwerp had never had any security under a policy until she began paying the premiums herself after the \$13.13 was credited. Suppose another creditor of the bankrupt's had, after his bankruptcy and before any dividend was made, taken out a policy on his life as security for the debt, and the bankrupt had died before any dividend was made, would it not have been necessary and proper to charge such creditor with the net amount realized on such security? Mrs. Van Antwerp has substantially taken out a new policy since the bankruptcy and before a second dividend is made, and ought to credit on the debt what she realizes on the policy, besides crediting all other payments on the debt, and when her debt is thus paid she ceases to be a creditor. The 22nd section of the bankruptcy act provides that a proof of debt must set forth whether any, and what, securities are held for the debt, and must state that claimant has not, nor has any other person, for his use, received any security whatever other than that set forth, and the same section, and general order No. 34, provide for the re-examination of all claims and proofs of debt at any time. This policy was in the hands of Mrs. Van Antwerp as much a security for this debt after, instead of surrendering it, she went on keeping it alive, as it was before.

As the credit of the \$13.13 was based on the surrender of the po-

bable costs of the suit, an order of attachment was sued out and levied on the defendant's boats, Glasgow, R. C. Gray, and Pink Varble.

Afterward the plaintiffs filed an amended petition, making John B. Castleman a defendant, to whom, as they alleged, the packet company had made an assignment of its property and effects, and seeking to enforce, as against him, as assignee, their claims and lien under the attachment. Castleman defended the action, not only controverting the alleged grounds of the attachment, but also the validity of all of the contracts of insurance as having been made by the plaintiffs, in the State of Kentucky, by T. B. Wayley, their agent, in violation of the law of this State, they being only incorporated by the laws of another State, and having wholly failed to comply with the conditions prescribed by the law of this State, upon which alone they could, through their agent, have lawfully transacted within it any business of insurance. There is some contrariety of evidence as to the capacity in which Wayley acted in effecting the contracts of insurance; but whether his attitude was that of an employed and accredited agent of the plaintiffs, or a mere insurance broker, it is clear, from the evidence, that he delivered the policies and took the notes of the defendant for the plaintiffs at Louisville, Kentucky, and thus, on their behalf, consummated the contracts, and did so without complying with our laws in regard to foreign insurance companies, and for that service he was adequately compensated by the plaintiffs. Upon the facts thus appearing, the court below adjudged, very properly, as we think, that the contracts were in violation of law, and could not be enforced in the courts of this State.

We cannot think that any argument is necessary in this case in support of the power of the legislature to prescribe and regulate by law, as was done by the act approved March 12th 1870, (1st volume, Acts 1869-70,) the terms and conditions on which fire, marine, and other insurance companies not located or incorporated in this State should be allowed to conduct the important business of insurance within it; and it seems to us that that act, by its tenor, details, and manifest objects, clearly imports a legislative purpose and intention, not only to prevent certain violations of the act by the imposition of penalties, but to render it absolutely unlawful for foreign insurance corporations, by their agents, as in this case, to make contracts of insurance within the State without complying with, and in disregard of the provisions of the act. This is particularly manifest from the 24th section of the statute, declaring it unlawful for such corporations to do insurance business in the State without an actual

paid-up capital of \$150,000, and by the 25th section, rendering the transaction of insurance business in the State by the agents of foreign companies unlawful, if done without the obtaining of a license from the auditor of public accounts.

Construing the statute, as we do, as not intended merely as a means of raising revenue from the business of insurance, but to affect the validity of contracts of insurance made in violation of it, or, in other words, to prohibit the business itself, so far as carried on in violation of law, the contracts of insurance sought to be enforced in this case were clearly illegal, and, upon principles of law now well settled, the court below properly refused to enforce them. *Lindsey vs. Rutherford*, 17 B. Munroe, 245; *Chitty on Contracts*, 419.

Wherefore, the judgment is affirmed.

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SUPREME COURT OF ILLINOIS,

CENTRAL DIVISION.

*Certified from Alton City Court.*

THE ANDES INSURANCE CO., *Appellant*,

vs.

ILLINOIS MUTUAL INSURANCE CO., *Respondent*.\*

A policy of insurance was issued by the respondent for \$6,000. Previous to the fire, \$2,000 of this was reinsured by the appellant, and the policy of reinsurance contained the clause, "Loss, if any, payable pro rata at the same time, and in the same manner as the reinsured company." After the fire, the loss was settled for \$600 and the respondent claimed the whole amount of \$2,000.

*Held*, that the contract of reinsurance is one of indemnity, and the actual loss sustained by the reinsured must be the measure of the indemnity.

*Held*, that if the insured parts with his interest before the loss happens, he cannot recover; and also, whatever affects the dammification must operate as the indemnity in the same degree.

*Held*, that the respondents were entitled to only a pro rata amount, or \$200.

SHELDON, J.

The only question here presented for decision is, as to the amount of recovery.

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\* Decision rendered ———.

The original insurer became liable to pay to the first assured the sum of \$6,000 in consequence of the loss of the subject matter of the first insurance; but it actually paid only \$600 in full discharge of the liability. The amount of the reinsurance was \$2,000. Shall the re-insured recover the full \$2,000, or only \$600, or a pro rata part of the latter sum?

So far as we are aware, the contract of insurance, or of reinsurance against loss by fire, has uniformly been held to be a contract of indemnity not exceeding the sum insured.

In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, not the measure of the assured's claim. The contract being one of indemnity, he is entitled only to that; and the actual loss sustained by the assured, is the measure of indemnity to which he is entitled, where it is less than the sum insured; so if the insured has parted with all his interest in the subject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for an indemnity, and he has sustained no loss or damage.

Although the original insurer here did become liable to pay the sum of \$6,000, that did not turn out to be the amount of its actual loss. The actual loss and damage which it sustained was \$600, the sum which it paid in full discharge of its liability.

That sum given to the reinsured would make good the loss sustained by reason of the original insurance, whereas, to allow a recovery of \$2,000, would enable it to realize a gain of fourteen hundred dollars over and above the actual damage it has sustained. It is difficult to see how this can be done consistently with principles, under a contract, which we apprehend this must be admitted to be, to indemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance. In *Bainbridge vs. Nelson*, 10 East., 346, it was said by Bayley, J.: "A policy of insurance is only a contract of indemnity, and anything which tends to show that an assured can recover beyond his indemnity, is against the very principle of the contract."

Of like import was the language of Lord Mansfield in *Hamilton vs. Mendes*, 2 Burr, 1210, in reference to an action on a policy of insurance as follows:

"The plaintiff's is for an indemnity; his action, then, must be founded upon the nature of the damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided

that the damnification in truth is an average, or perhaps no loss at all." "Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, where, upon the whole event, no damage has been sustained."

The precise point here involved is quite barren of the authority of adjudged cases. As the contract of reinsurance was virtually prohibited in England more than a century ago, it having been there forbidden except where the insurer shall be insolvent, become bankrupt, or die, by the statute 19 Geo. II, chap. 37, sec. 4, that may account for the absence of authority in the English reports upon the point.

What little authority is to be found, it must be confessed, is in support of the view that, where the first insurer becomes insolvent, and on a compromise with his creditors pays only a certain percentage of the loss sustained by the insured, the reinsurer is nevertheless bound to pay the reinsured the full amount of the reinsurance.

Such was the decision of a French court of admiralty at Marseilles, made in 1748.

In *Hone vs. Mutual Safety Insurance Co.*, 1 Sandf., R., 137, this subject is quite elaborately considered, and the authorities bearing upon it adduced, and the doctrine laid down by the above French decision is recognized and adopted as the true rule of law which governs the extent of the liability of a reinsurer.

There are treatises on insurance where the same doctrine may be found to be laid down; but so far as they have for its support the authority of adjudication, they seem to depend upon the two cases above cited.

In *Eagle Ins. Co. vs. The Lafayette Ins. Co.*, 9 Ind., 443, the case in 1 Sandf. is, with seeming reluctance, barely recognized as authority.

This comprises the sum of the authority of adjudged cases to which we have been referred, or which have been brought to our notice in support of this doctrine of the reinsurers' liability, for the full amount reinsured, as contended for by the appellee.

We can understand how the reinsured party, where the amount of his liability has been ascertained, may be admitted to recover to the full extent of the liability, so long as the liability to pay continues, although he may not have made payment, or may be insolvent and unable to pay. But when the liability has become actually discharged by the payment of a sum less in amount, it is difficult to

should accrue in the future. But that the defendant refused to receive them, and declared to the plaintiff that his policy was forfeited by reason of the failure to pay each of the past annual premiums as they fell due, and required the plaintiff to take notice that it would not be responsible to him for anything under said policy in the future. The suit was brought in the Circuit Court for the city of Richmond, but was removed by the defendant to the Circuit Court of the United States.

The defendant demurred to the declaration on two grounds. 1st, that the failure to pay the premiums during the war had forfeited the policy. 2nd, that no breach of the contract had been averred.

The argument on the second point was in substance as follows : It is true that the defendant refused to receive the accumulated premiums, and repudiated all obligation under the policy, declaring that it would not be bound to the payment of the sum insured when the plaintiff should die. But the refusal to receive the premiums did the plaintiff no harm ; he remained that much the richer, by having and retaining the money in his pockets. And the declaration that the company would not be bound to the payment of the insurance money at the period of the plaintiff's death, was one that was revocable. *Non constat*, though the company now say they will not pay the insurance money, but they will pay it when the time for payment arrives, which is the time of the plaintiff's death.

JOHNSTON WILLIAMS AND BOULWARE, *for Defendant.*

WILLIAM L. ROYALL, *for Plaintiff, said,*

Upon the first point raised by the defendant's demurren, I shall say nothing, being content to refer to the decided cases in support of the proposition that the intervention of the war was a sufficient excuse to a policy-holder for his failure to pay such premiums as fell due during the period of time that the war lasted. *Manhattan Life Ins. Co. vs. Warwick*, 20 Gratt., 614 ; *New York Life Ins. Co. vs. Clopton*, 7 Bush, (Ky.,) 179 ; *Hamilton's Ex'rs. vs. The Mutual Life Ins. Co.*, 9 Blatch., 234 ; *Sands vs. Ins. Co.*, 59 Barb., 556 ; *Cohen vs. Ins. Co.*, 50 N. Y. ; *Sands vs. Ins. Co.*, *ibid.* ; *Robinson vs. Ins. Co.*, 42 N. Y., 54. *Contra*. *Tait vs. New York Life Ins. Co.* Circuit Court of the United States for the Western District of Tennessee, opinion of Emmons, J.

Upon the second point raised by the demurrer, it may now be considered too well settled for argument, that a contract may be broken



before the day for its performance arrives by one of the parties to it repudiating it and notifying the other that he will not be bound to its performance, thereby giving the latter the right to treat it as though the time for its fulfillment had passed. Chitty on Contracts, 10 Am. ed., 799 ; Hochster vs. De La Tour, 2 Ellis & B., 678 ; Frost & Knight, Law Reports, 7 Exch., 111 ; Avery vs. Bowden, 5 Ellis & B., 714 ; Danube and Black Sea Co. vs. Xenos, 13 C. B., N. S. ; Dugan vs. Anderson, 36 Md., 567 ; Mountjoy vs. Metzger, Am. Law Reg. for July, 1873, p. 442.

It is conceded that wherever time is a part of the consideration of a contract, no action should be permitted until the day for performance arrives. As, for instance, if A. buy a horse from B. and promise to pay him \$100 for the same, twelve months from that time, though B should in the meantime notify A that he would not pay the money when the day of payment comes, yet A should not be allowed to sue B until that time ; for the twelve months time was, perhaps, the cause which mainly induced B to purchase the horse. Possibly, if he had been required to pay cash, he would have been unwilling to give more than \$50. So that it would be manifestly unjust to deprive B of the benefit of that which mainly induced him to make the bargain. And on this principle is the case of Greenway vs. Gaither, Taney's Circuit Court Decisions, to be supported. But in these life insurance contracts time is no part of the consideration stipulated for by the insurer. Money is what he stipulates for ; the amount of it to be determined by the duration of the life of the insured. And if the insured were willing, the insurer would always pay him on the day when the contract was entered into, the amount promised at his death, provided the insured would pay to the insurer that day the number of annual premiums which the insurer expected to receive, to be determined by the probability of life in the insured, with interest on each one. For in such a case, the amount paid to the insurer would vastly exceed that paid to the insured.

What then should be the measure of the plaintiff's damages ? What are his rights in the policy ? The plaintiff ought not to recover the full amount of the policy, for he was to receive that only after he had paid a premium of \$142 for each year of his life to the defendant, and all premiums that have accrued since 1861 to this time are unpaid, and the plaintiff has yet some years to live, for each one of which, if the defendant is to pay \$5,000, he ought to have credit.

The plaintiff ought then to recover \$5,000, less the number of pre-

frame dwelling, occupied by him, situate southwest corner Second and Vine Streets, Leavenworth, Kansas, and \$300 on frame barn in rear of same."

On the 24th of April, 1872, McLanathan commenced an action in the District Court of Leavenworth County against said company, and in his petition, in substance claimed that on the 29th of January, 1872, the dwelling-house specified in said policy was damaged \$2,500 by fire—and that the company had immediate notice thereof, as required by the policy—and that immediately thereafter, and upon full knowledge of the facts above mentioned, the company gave notice of intention to repair the property, and proceeded, with his consent, to make preparations to do so, and undertook to do so, and that relying thereon he refrained from proceeding to repair, but that the company refused to repair, and that by reason of the damaged condition of the dwelling, caused by the fire, it, by delay, became additionally damaged \$1,000—and that he performed on his part every act required by the terms of the contract of insurance, and asked judgment for \$3,000 and interest.

After answer and reply the case was tried by a jury, which returned the following special verdict :

We, the jury, find as follows—

1. That the dwelling-house described in the policy of insurance, was built by the plaintiff in the year A. D., 1859, on lots which had before that time been conveyed to Lucy B. McLanathan, wife of plaintiff, and the fee simple title to which lots was then in the said Lucy B. McLanathan, also continued up to and including the date of the fire hereafter mentioned ; said dwelling-house rested upon a stone foundation, built with mortar, and entering the ground at least a foot and a half.

2. That at the time the said policy of insurance was made, the plaintiff applied to Daniel R. Anthony, who was the duly authorized agent of the defendant, to issue policies of insurance, for a policy of insurance on said house, and that the said agent having made out this policy, the plaintiff informed him that the lots on which the house was situated were deeded to the wife of the plaintiff, but that he (the plaintiff) had built the house. And the said Anthony then stated to plaintiff that it would make no difference whether the policy was made to him or his wife, whereupon the plaintiff paid his insurance money and took the policy.

3. That the said plaintiff, with his family, had occupied said house

from the time it was built till the time of the fire herein referred to, and the said D. R. Anthony, the agent of the defendant, knew the facts as to the title to said property at the time he made said contract of insurance.

4. That as to all interest, legal or equitable; in said house, owned by the said Lucy B. McLanathan, the said plaintiff, in making said contract of insurance, made the same for, and in behalf of him and wife, and took said policy of insurance to himself for the benefit of himself and wife, the said McLanathan then acting in the procuring of said policy for himself, and as the agent of his said wife.

5. That on the 28th day of January, A. D., 1872, said house accidentally took fire, and a part thereof was destroyed by fire, and the building greatly damaged both by fire and the efforts to extinguish the same, without fault of the plaintiff.

6. The plaintiff immediately notified the agent of said loss, and the agent of the defendant (Mr. Mosier) told the plaintiff that it was unnecessary to furnish proofs of the loss, because the defendant had elected to repair the building. That on the 28th day of February, 1872, the defendant served on the plaintiff another notice, of which the following is a copy :

LEAVENWORTH, KANSAS, Feb. 28, 1872.

H. L. S. McLANATHAN, ESQR., *Leavenworth, Kansas :*

*Sir :* You are hereby notified of the determination of the American Central Insurance Company, of St. Louis, Mo., to repair your late residence, situated in the southwest corner of Second and Elm Streets, Leavenworth, Kansas, which was, on or about the twenty-ninth (29) day of January, A. D., 1872, damaged by fire and water, and that the said company will commence the said repairs immediately on the receipt of proper proofs of loss, as per your policy of insurance in said company on said building.

Yours very truly,

DAVE ROBICK,

*Special Agent, Am. Cen. Ins. Co., St. Louis.*

7. That on the seventh day of March, A. D., 1872, the plaintiff delivered to the defendant the notice and proof of loss, of which copies are inserted in the answer of defendant, to which proofs no objection was made by the defendant at any time.

8. That after the expiration of one month from the date of delivery of said proofs of loss, said defendant having failed to make any ob-

jections thereto, or to repair said building, informed said plaintiff that said defendant would not repair said loss. Therefore said plaintiff made a portion of the necessary repairs and took possession of said house.

9. That the plaintiff, in making his proof of loss, did not intend to defraud defendant.

10. That the foundation of the kitchen attached to said house was moved by plaintiff on to the west side of said house on the 4th day of March, 1872, the defendant agreeing thereto, on plaintiff's paying the cost of said removal, and whatever additional sum it might cost to make the repairs by reason of the location of said kitchen on the west side of said house.

11. That the agent of defendant, in making the policy, made a mistake in describing the location of the building, as at the southwest corner of Vine and Second Streets, instead of at the southwest corner of Elm and Second Streets.

11 a. That there was at the date of said insurance policy a street in said city called Vine Street, and a street called Second Street, and the street called Elm Street, and that the agent of the defendant, at the time of the execution of the policy, knew that the dwelling-house aforesaid was located on the southwest corner of Elm and Second Streets, said Vine Street being one street north of Elm.

11 b. That at the time of the execution of the said policy there was erected on the southwest corner of Second and Vine Streets a frame dwelling-house, the north part of which was two stories in height, the upper story being a half story, but the south part of same was one story, and that there was also then, in the rear of said dwelling-house, a barn or stable, and that neither of which last named dwelling or barn was injured by fire.

12. That the dwelling described in said policy is and was the same which is now, and was occupied by the plaintiff and his family, and was then and now situated on the southwest corner of Second and Elm.

13. That the injury to said dwelling-house by said fire, and the amount it then would have cost to repair the same was (\$1,600) sixteen hundred dollars.

14. That at the time said defendant informed said plaintiff that said defendant would not repair said house, the injury to the same, by reason of the action of the weather thereon, and the additional amount it would cost to repair the same, in consequence of such exposure to the weather, was (\$400) four hundred dollars.

On the above facts, we, the jury, assess the plaintiff's damages (\$2,000) two thousand dollars, as follows:

By fire.....	\$1,600	dam
By exposure to weather.....	400	dam
Total amount.....	\$2,000	

JAS. BAUSERMAN, J

Upon this special verdict, judgment was entered in favor of Lanathan for \$2,000, and the company now brings the case in error. A lengthy and elaborate brief has been filed by the counsel for the plaintiff in error, and many questions are discussed in it. We shall not be able to notice many of them in detail, nor will it be necessary, as the determination of two will decide the case, the principles involved in those remaining. The first question we shall notice is as to the location of the property insured. It is described in the policy as "a two-story frame dwelling, occupied by him, situate south of Second and Vine Streets, Leavenworth, Kan., and frame building of same." As a matter of fact the dwelling occupied by McLanathan and which had been occupied by him for a dozen years, known to the agent of the company at the time he drew up the policy, was on the southwest corner of Second and Elm Streets. We found (see findings, 11 and 11 a,) that the agent knew of Lanathan's residence, and simply made a mistake in writing Elm instead of Elm Street. This is not a case of an entire misdescription but simply one of repugnant calls. The dwelling occupied by McLanathan was not on the corner of Second and Vine Streets, but vice versa the building on the corner of Second and Vine Streets was not, and had never been occupied by McLanathan. In such a case the contract is not void for uncertainty, nor is there any room for reformation of the contract, provided it appears from the face of the instrument or extrinsic facts, which show the false description. *Falsa demonstratio non nocet*. "The rule is clearly settled that where a sufficient description is set forth of premises, by giving the name of a close or otherwise, we may reject a false description." *Doe & Smith vs. Galloway*, 5 Barb., pp. 43-51. In 1 Ev. § 301, it is said: "If there be a repugnant call, and other calls in the patent clearly appears to have been intended to describe the premises, the repugnant call will be rejected."

mistake, that does not make void the patent. \* \* \* So if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description and not to the other, the description of the lands which he owned will be taken to be the true one and the other rejected as *falsa demonstratio*." Now upon the face of this policy no repugnancy is apparent, and it is only in attempting to apply the description to the property that the repugnancy appears, and in the very application is disclosed that which clearly determines which is the true and which the false description. For that McLanathan should insure his homestead is reasonable; that he should insure property in respect to which he had neither possession, claim nor title, is improbable. According to the last citation from Greenleaf, if McLanathan and wife conveyed "their dwelling, occupied by them, on the corner of Second and Vine Streets," and it appeared that they owned and occupied the dwelling on the corner of Second and Elm Streets and did not that on the corner of Second and Vine, the conveyance would be good of that which they did own. *A fortiori*, when the instrument is not a conveyance of title, but only a contract for indemnity, will the repugnancy be resolved in favor of that property which alone it was the interest, and therefore the evident purpose of the parties to secure. We think, therefore, that there is nothing in the description to prevent the defendant in error from recovering on this policy. Loomis vs. Jackson, 19 Johns., 449; 1 Greenleaf on Ev., sec. 300-302, and notes; 2 Hilliard on Real Property, pp. 358-368.

We come now to a question or questions far more difficult than the preceding, and which are of vital importance. It appears from the first finding that the fee of the lots upon which was the building insured, was conveyed to the wife of the defendant in error prior to the erection of any building, and has so remained ever since. The questions then arise. Had McLanathan any interest in the building that he could insure or such as would enable him to maintain an action on this policy for injury? If he had, did the failure to state the exact nature and extent of that interest avoid the policy? How far may the company raise these questions, and how far is it estopped, and how much has it waived by its own acts or the acts of its agents? The policy in this case was not issued upon the strength of a written application or based upon representations therein. It, in and of itself, states and embodies the entire contract between the parties. It is provided in it that "if the interest of the assured is not one of absolute ownership, and the nature of the interest is not clearly de-

insurer to know the nature and extent of that interest, that he may judge of the safety and expediency of the risk. Being a stipulation for the insurer's benefit, he may waive it. But it may be said that all prior talk and negotiation is merged in the written contract, and that this represents the entire agreement between the parties. The testimony shows that the policy was all prepared, signed, and ready for delivery at the time of this conversation between the agent and McLanathan. It is not therefore prior, but contemporaneous. It is part of the agreement. A case almost exactly in point is that of *Franklin vs. Atlantic Fire Ins. Co.*, 42 Mo., 456. In that the policy was issued without any written application. The exact state of assured's title and interest was made known to the agent. He made no note of it on the policy, and told the assured it would make no difference. The policy contained a stipulation similar to that in this. Mr. Justice Holmes, in giving the opinion of the court, says: "The actual state of the case, then, is that the agent receives a verbal application for insurance, and before the policy takes effect by delivery, the interest of the assured in the property is truly stated to his satisfaction, by which his attention is called to the circumstances that the specific character and extent of the interest ought to be expressed in the written instrument, and he answers: 'It will make no difference, it is all right,' receives the premium and delivers the policy. The policy is accepted and the premium paid on the faith of this assurance. The party insured goes away, relying upon its validity to protect him against loss during the time specified. He acts upon a state of things represented to him by the agent to be sufficient, and it would work a fraud upon him if the company should now be allowed to avail itself of this defence." Language more appropriate to the facts of this case could hardly be found elsewhere, and it meets our entire approbation. See also the case of *Anson vs. The Winnesheik Ins. Co.*, 23 Iowa, 84, where both the application and the policy were made out at the instance of the agent, who had full knowledge of the facts, in the name of Jane Anson, the former owner, but then deceased, and the heirs were held entitled to recover. More than this, the company after the loss, and with full knowledge of the facts, elected to repair the loss, and served notice upon defendant in error of such election. (See finding number 6.) This, it would seem, ought to be a waiver of any such omission in the policy as that claimed in this case. *Bersche vs. Globe Mutual Ins. Co.*, 31 Mo., 546. Had McLanathan any insurable interest? He built the house on his wife's lots, and with her occupied it as their joint homestead

for many years. He acted as his wife's agent, so far as interest, legal or equitable, in making this contract, and policy for the benefit of himself and wife. The complete knowledge of the condition of the title at the time of the notice of election to repair, (see findings 1, 2, 3, 4, one has as yet succeeded in giving an entirely satisfactory definition of the term "insurable interest." Angell, in his work *Life Insurance*, section 56, says, "that it would be extremely difficult to afford any accurate definition of 'insurable interest.'" In the same section: "Accordingly, it is recognized in this day of the law, that almost any qualified property in the thing, even any reasonable expectation of profit or advantage from it, may be the subject of this species of contract; and may be founded in some legal or equitable title." And again it is clear that the term interest as used in application to the thing insured, does not necessarily imply property." It is also true that a trustee or agent having no personal pecuniary interest in the property, may yet effect an insurance on it. *Lucena v. N. B. Co.*, 3 Bos. & Pull., 95; *ib.*, 5 Bos. & Pull., 289; Angell on Insurance, sec. 73; *Ina. Co. vs. Chase*, 5 Wall., 512; *Goodall vs. N. B. Co.*, 25 N. H., 169; 2 Green on Ev., sec. 379, and *Neuberger vs. Beacom*, 9 Penn. St., 198; *Siter vs. Morris*, 218. It has also been decided that a husband has an interest in buildings situate on his wife's realty. *Franklin v. Drake*, 2 B. Mon., 47; Angell on Insurance, sec. 64; *Co. vs. Hall*, 18 Md., 27; *Harris vs. York Mutual Ins. Co.*, 341. In this last case, Woodward, C. J., speaking for the court, says: "If there were more doubt than there is about the nature of the husband's interest, we think his purchase could be supported on the ground of agency for her; but again: "When he has effected an insurance on house and lot, the possession of which belongs to her, the law will presume that the husband's act, if not her precedent authority to purchase, will support the insurance for her benefit." While perhaps it is doubted whether these authorities are entirely applicable to the present State, owing to the statutory changes in the relations of husband and wife to the separate property of each, yet we think them sufficient to sustain us in holding that where a husband erects a dwelling on a lot, and with her occupies it as a mutual homestead, and an agent effects an insurance for their mutual benefit, in his own name, and the insurer, aware of these facts, issues the



On the 13th of August, 1857, John S. White effected a policy of insurance on his own life with the New York Insurance Company, whereby the company, in consideration of \$73.50 in hand paid, and of the annual payment of the like sum of \$73.50 on the 13th day of August, in every year during the continuance of the said policy, assured the life of the said John S. White, describing him as "John S. White, carpenter, of Portsmouth, in the County of Norfolk, State of Virginia," in the amount of fifteen hundred dollars, for the term of his natural life, commencing on the 13th of August, 1857, at noon, and did thereby promise and agree to and with the assured, his executors, administrators and assigns, to pay the said sum of \$1,500 to the legal representatives of the assured within 60 days after due notice and proof of his death, deducting therefrom all unpaid notes for premiums on the policy, with a proviso (among others) that "in case the said White shall not pay the said premiums on or before the several days herein before mentioned for the payment thereof, together with the annual interest on any notes that may have been given for 40 per cent., and such assignments thereon as may be made and called for by the trustees; then, and in every such case, the said company shall not be liable to the payment of the sum assured, or any part thereof, and this policy shall cease and determine," with an indorsement on the margin of the policy in these words: "All receipts for premiums paid at agencies are to be signed by the president or actuary." The policy was effected at Portsmouth through James T. Borum, the agent of the company there, and all the premiums, etc., were regularly paid to said agent at that place, to the 13th of August, 1861. John S. White died on the 19th of August, 1861, in the arms of the said James T. Borum, the agent of the said company.

The premium due the 13th of August, 1861, was not paid, and the assured was prevented from paying it, and the interest and assessment then due, because the company had failed to furnish their agent, at Portsmouth, with the necessary renewal receipts and statement of assessments and interest due. According to the rules of the company, and indorsement in the margin of the policy, all receipts for premiums paid at the agencies had to be signed by the president or actuary and only countersigned by the agent, and the agent had no authority to give receipts, but only to countersign those given by the president or actuary. There had been no communication between New York (where the company was located) and Portsmouth, Va.,

be forwarded to him. To this the company replied by letter, dated 11th December, 1862, in which they declined to admit their responsibility and refused to pay anything to White's representatives, and failed to send the blanks requested for the purpose of making formal proof of the death of the assured.

A formal affidavit of the death of White was made on the 28th of June, 1867, and duly forwarded to the company by the attorney of the plaintiff on the same day, to which the company, through their agents, Bain & Bro., responded, declining to pay the policy, but offering to pay \$84; and this suit was commenced on the 5th of September, 1867.

Upon the trial a verdict was rendered in favor of the plaintiff, and the company asked for a new trial, which was refused and an exception taken and the facts certified, the material parts of which have been already stated. The defendants asked for seven different instructions—the first was refused, the second given with an addition to it, and all the others given in the form asked for, and an exception was taken to the ruling of the court in regard to them. The counsel for the company, in his argument here, has attempted to distinguish this case from that of *Manhattan Life Insurance Company vs. Warwick*, 20 Gratt., 614. It is argued here that there was no actual tender of the premium, as there was in that case. That there is no provision in the policy, in this case, that it was not to be binding until countersigned by the agent in Virginia, as there was in that case, and that this is, therefore, not a Virginia contract to be performed here, but a New York contract to be performed there; and that whether it was one or the other, it was an executory contract, and became void and dissolved by the operation of the war; the parties being respectively domiciled in the opposing sections, and consequently enemies, and thus raising again one of the main questions relied on by the insurance company in 20 Gratt., and overruled by a majority of the court.

Although the policy in this case does not provide that it was not to be obligatory until countersigned by the local agent, yet it is proved that it was effected in Portsmouth with the agent there, and was perfected by delivery and the payment of the advanced premium to the agent at that place; and the succeeding premiums were all paid to the same agent at the same place, upon receipts furnished by the company for that purpose, signed by the president and countersigned by the agent, thus being treated and regarded by both parties as a Virginia contract, to be performed on the part of the assured in

proper authority to collect and grant receipts. If he was not such agent, and his powers were revoked by the defendant's withholding from him the renewal receipts necessary to enable him to collect the premiums, then it was unlawful for White to pay, and likewise unlawful for the company to receive payment at his hands, (they being technical enemies,) and White stood excused by the rules of public law from making the tender during the war.

I do not think the court erred in refusing to give the first instruction asked for by the defendants, as that proposed to instruct the jury that a failure to pay, or make a tender of the premium, which fell due on the 13th of August, 1861, was a forfeiture of the policy under all circumstances, and for which there could be no excuse. By the second instruction, as propounded by the defendants, the court was asked to instruct the jury "that unless they believed from the evidence that due notice and proof of the death of John S. White was forwarded to the defendants at least sixty days before the institution of the suit, they must find for the defendants," which the court gave, with the following addition, viz: "unless they further believed that the defendant waived such notice and proof of death." I think the court did not commit any error in making this addition to the second exception, as it was proved that the defendant, when informed of the death of White, in December, 1862, had declared its determination not to recognize its obligation under the policy, or to make any payment on account of it. Nor do I think there was any error in overruling the motion for a new trial, except that the court ought to have put the plaintiff under a rule to abate the verdict by the amount of the premium which fell due on the 13th August, 1861, but this may be corrected here. I am in favor of affirming the judgment, corrected in this respect.

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those terms as used which it would be his duty to failure to mention which would make his answer false.

There is no just ground of complaint in this instrument considered abstractly or in its application to the evidence. It was, in effect, saying that substantial truth in the verdict was required. If, therefore, the defendants have been satisfied by the verdict of the jury rather than by any error of law, the judgment is affirmed.

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## COURT OF APPEALS OF NEW YORK

SEPTEMBER TERM, 1873.

HENRY F. BRIGGS, ET AL., *Appellants*,

vs.

THE NORTH BRITISH AND MER. INS. CO., *Respondents*.

The defendant insured the plaintiff's property, an oil refinery, etc., against loss by fire. Policy contained a proviso that "not be liable for loss caused by \* \* \* explosions of any fire only." An explosion was caused by a lighted lamp in contact with the inflammable gas. The machinery was wholly destroyed by the explosion, and soon after a fire broke out, which destroyed the property. The damage caused by the explosion was slight, compared with the damage caused by the fire. The damage caused by each separately.

*Held*, that loss by an explosion, caused by fire, was not covered by the policy.  
*Held*, that where an explosion is the incident and fire the result, different views might obtain.

Appeal by plaintiffs, with stipulation, from an order of the General Term of the Court of Sessions for a new trial in this case by the General Term of the Court of the Supreme Court. The plaintiffs recovered at the trial.

THOMAS CORBETT, *for Appellants*.

JOHN GANSON, *Opposed*.

The defendant insured the plaintiffs' property, etc., in a certain mill, against loss by fire, with the usual conditions.

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\* Decision rendered September 23rd, 1873. To appear in 53 N. Y.

There seems no reason for excluding an explosion like this, from the exception. There was no fire prior to this explosion. The burning lamp was not a fire within the policy. The machinery was not on fire, as such a term is ordinarily used, until after the explosion. The explosion here was the principal and the fire the incident.

In such a case there can be no doubt that the defendant is not liable for the damage caused by the explosion. When, however, the explosion is the incident and the fire the principal, a different question would be presented. Had the building been on fire, and in the course of the general conflagration there had been an explosion of a boiler, which injured some machinery that the fire was rapidly consuming, different views and considerations might well obtain. There are other exceptions in the policy which include cases of loss caused by fire, where the defendant is not liable though the exception by fire is not specially mentioned. Such are case of loss caused by "invasion, insurrection, riot," etc.

I can see no authority or reason for inserting an exception, or a limit to the exception, in this policy which the parties have left out.

The judgment should be affirmed and judgment absolute for plaintiffs for the amount of damage caused by the fire, as found by the jury, with costs to the defendant of this appeal.

**All concur.**

SUPREME JUDICIAL COURT OF MASSACHUSETTS,

MARCH TERM, 1873.

COMMONWEALTH, BY THE INSURANCE COMMISSIONER,

*Plaintiff,*

vs.

MONITOR MUTUAL FIRE INS. CO., *Defendant.\**

*Held*, that premium notes in a mutual fire insurance company are a part of the contract price or consideration of insurance, and are a reserved fund or investment of part of the capital of the corporation.

*Held*, that the manner of the assessment as between the members must be determined by the character of the liability.

*Held*, that the statute liability outside of the deposit notes is not properly of the corporation, but rather an indemnity imposed by law upon the members.

*Held*, that the statute liability is not to be resorted to until the debts have exhausted the entire capital and assets of the corporation; therefore the assessment must, in this case, be made upon the notes and not upon the statute liability.

A petition was brought before the court by William G. Colburn, receiver of the Monitor Mutual Fire Insurance Company, representing that the liabilities of said company exceeded assets, and that the directors had voted an assessment upon all the members liable thereto, in proportion to their premium and deposit to pay the same, and the expense of collecting said assessment. The prayer of the receiver asked the court to examine said assessment, and to make such orders and decrees with reference to the collection of the same, or otherwise, as law and equity shall require.

The matter being referred by the court to Darwin E. Ware, auditor, to report on the assessments, it appeared by his report that, on the 24th of January, 1871, the respondent company was enjoined from further prosecuting the business of insurance. The total amount

\* Argued March Term, 1873.

an assessment upon the members may be required to the statute, whether there are notes that might be wise or not. But the application of such an assessment to the members themselves, must be determined by the character of the liability which is subject to the assessment, and not by the character of the liability which it is required to be, or in which it is in fact subject to the statute liability, outside of the deposit note, is not the liability of the corporation, but is rather an indemnity imposed by the members as corporators. It is in some sense the liability of the corporation to be availed of in case of necessity, when the debts have exhausted the assets of the corporation, including all rights which it has in the contract as property. The statute liability is indeed so far from being a part of the contract of insurance. But it is a part of the consideration of that superadded liability, and is made upon the members indiscriminately, without distinction between their liability upon their notes and upon the statute liability, and must be altered accordingly.

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UNITED STATES CIRCUIT COURT

NORTHERN DISTRICT OF ILLINOIS

JUNE TERM, 1872.

*Set-off in Equity under the Bankruptcy Act.*

DRAKE, Plaintiff.

vs.

W. E. ROLLO, ASSIGNEE OF THE MERCHANTS' INSURANCE COMPANY,  
Defendant.\*

*Held*, that where a person borrowed money of an insurance company partly in three and partly in five years, and before the payment of the same

\* Through the kindness of JOSIAH H. BUSELL, official reporter, we have obtained the following opinions.

argument having a bearing on the point now under consideration—*in re* The City Bank of Savings, 4 Legal News, 81, by the district judge of California. It was held in that case, that the fact that the creditor of the bankrupt, at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off the claim thus assigned against the debt. The report of the case does not state explicitly whether the debtor, at the time of the assignment, knew of the insolvency of the bankrupt, but perhaps it may be an inference that such was the fact.

The court overruled the objection that the effect of allowing the set-off would be a fraud on the law, and seemed inclined to give an absolutely literal construction to the 20th section, while admitting that the result would be to enable one creditor to obtain full satisfaction of his claim to the prejudice of other creditors. We admit that this may be so if there is good faith. We do not doubt a debtor can purchase a claim at any time before the filing of the petition in bankruptcy against the creditor, and set it off, provided the purchase is made without notice of insolvency, for value, fairly, and not in fraud of the law ; and we thus give full effect to the statute.

If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it is the duty of a court of equity so to construe the twentieth section as not to suffer it to defeat the main purpose of the bankrupt law, or to permit a trick of one creditor to prevail for the payment of his claim in full to the sacrifice of the claims of other creditors.

It is said that there must be some time fixed within which doubtful transactions can no longer be questioned. Is it for a court of equity, or the bankrupt court in the exercise of its equitable powers, to decide under what limitations the right shall be placed, looking at all the circumstances of the case.

Our attention has been directed to a case not cited on the argument. *Smith vs. Hill*, 8 Gray's, R., 572.

In that case the defendant purchased claims against a person, knowing him to be insolvent, and having reason to believe that he was about to be put into insolvency, and then, in a suit by the assignee, proposed to set off these claims against a debt he owed the insolvent. Under the statute mutual debts and demands could be set off. But the court held that the effect of allowing the set-off would be to interfere with the proper distribution of the estate of the insolvent, and would be contrary to the spirit of the insolvent laws ;



# MISCELLANEOUS DEPARTMENT.

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## IMPORTANT QUESTIONS IN FIRE INSURANCE.

In the General Term of the Cincinnati Superior Court, at Cincinnati, November 21, the case of Joseph K. Frick vs. The Merchants' Ins. Co., of Cincinnati, and the same against the People's Insurance Co., both involving the same questions, were decided, Judge Yapple delivering the opinion. In the first named case the judgment was reversed on an error of instruction, and in the second case the verdict was sustained. The actions were brought on policies on the American Hotel, in Cairo, Ill., the building standing upon leased ground. The following summary of the opinion covers all the insurance questions raised in the case :

First—Where a lessee has erected buildings upon his leasehold, with power to remove them at the expiration of his lease, or with the privilege to purchase them reserved to the landlord, such lessee may insure the property to its full cash value, and if asked by the insurance company whether any other party was interested, he may with truth answer, "No ;" nor will the reservation of a lien by the landlord for rent give him an interest in the property.

Second—If the property be described in the policy as a hotel, boarding-house, and bar-room, this is a matter of description, relating only to the then use of the property, and is neither a warranty nor representation that the use will be continued, and the insured may

recover for his loss though it has stood unoccupied for a long time, and up to the time of the loss.

Third—If the insurance be renewed upon the original application, while so vacant, and the agent of the company taking the renewal knew at the time that such property was then vacant, the company would be held to have waived such misdescription, and be precluded from insisting upon it as a misrepresentation.

Fourth—If a policy stipulates that during the time any business designated in it as extra or specially hazardous shall be carried on, the risk shall cease during such continuance ; the fact that a carpenter, whose business is denominated specially hazardous, occupies and uses a part of the insured property for the purpose of making repairs there, will not affect the insurer's right to recover, when it appears such use did not continue until the happening of the loss. Such clauses must be held to forbid only the habitual or regular use of the property for such hazardous purpose, and not the occasional use for the temporary purpose connected with the preservation of the premises.

Fifth—Where a term of policy requires that upon the happening of a loss the owner shall give to the company immediate notice thereof, and deliver as soon as possible a particular account of the loss, and upon the happening of the loss due notice be given, but no proof or account of such loss be furnished for five months thereafter, and the company, without waiting for such proof or

No settlement could be made between the parties, and the case was carried into the Superior Court at Portland, and a trial before a jury reached on Monday, November 10, 1873.

The plaintiffs claimed a total loss, but the defendants denied that it was a total loss, and claimed that the proof of loss is insufficient. The defendants introduced no evidence, but consented to a verdict for the plaintiffs for \$3,693.-67, which is to stand, if, upon the evidence, or so much of it as is legally admissible in the opinion of the full court, the action can be maintained and the verdict sustained. If not, a nonsuit is to be entered on such judgment as the legal rights of the parties may require.

The whole issue really is, whether or not the loss was total. About two thirds of the ice, in bulk, remained; but plaintiffs claimed that by burning of ice-houses and packing, the ice contained therein always became so affected by smoke, acids, and creosote, as to be utterly useless, especially for shipping purposes, there being no home market for the ice in controversy. It was proved that "burnt ice," or ice which has passed through a fire, is entirely unmarketable and valueless in New York and Boston (or in the ice-houses that supply those cities); and the effect mentioned was proved by several witnesses testifying from their own experience; one that he had twice thrown away a stock of several thousand tons, because worthless from effects of fire. He was uninsured.

#### RATE OF MORTALITY IN ENGLAND.

The Registrar-General for England, being now in possession of the census returns of 1871, is able to show, in his thirty-fourth annual report, the rate of mortality in England (including Wales) for each of the 34 years 1838-71, at

12 groups of ages, science being no longer contented with the "seven ages" of old times. He considers this to be one of the most important series of facts relating to the life of a nation ever published. The returns for the 34 years show that the annual mortality of males under five years of age averages 7.26 per cent. of the whole number of males under that age living, and of females 7.27 per cent.; of males, five years and under 10, 0.87 per cent., and of females, 0.85 per cent.; of males, 10 years of age and under 15, 0.49 per cent., and of females, 0.50 per cent.; of males, 15 years of age and under 25, 0.78, and of females, 0.80 per cent.; of males, 25 years of age and under 35, 0.99, and of females, 1.01 per cent.; of males, 35 years of age and under 45, 1.30, and of females, 1.23 per cent.; of males, 45 years of age and under 55, 1.85, and of females, 1.56 per cent.; of males, 55 years of age and under 65, 3.20, and of females, 2.80 per cent.; of males, 65 and under 75, 6.71, and of females, 5.89 per cent.; of males, 75 and under 85, 14.71, and of females, 13.43 per cent.; of males, 85 and under 95, 30.55, and of females, 27.95 per cent.; of males, 95 years of age and upwards, 44.11, and of females, 44.04 per cent. The mortality of males is greater than that of females in every one of these 12 periods of life, except in the three extending from 10 to 35 years of age. The average annual mortality of males of all ages in England in the 34 years is 2.33 per cent., but of females only 2.15 per cent. The mean lifetime of the English people is 40.86 years, or in round numbers, 42 years; that is the average number of years that people born in England live.

#### JUDGE ANDREW MILLER.

Alluding to the resignation of Hon. Andrew Miller, Judge of the United States District Court of the Eastern Dis-

trict of Minnesota, the *St. Paul Pioneer* says: "He has filled the place from the dawn of the Territory, in 1836, to the present time, or about thirty-seven years, and with the possible exception of one or two cases involved in heated political discussions, always acceptably to the public. His venerable Territorial colleague, Chief Justice Dunn, who held the first court in Minnesota, together with Judge Irwin, have both passed away, full of years and honors. Old age now calls for the retirement of the sole survivor. That it may be a happy one, and long continued, will be the prayer of multitudes. We know of no one among living men who has borne honors so long, or been so faithful to every duty of the position. The State will be fortunate, indeed, if it can secure his equal for a successor."

#### EFFECT OF THE CIVIL WAR ON LIFE INSURANCE POLICIES IN THE SOUTHERN STATES.

In this number of the *INSURANCE LAW JOURNAL* we give the report of Wingfield, J., Supreme Court of Appeals, in the case of *New York Life Ins. Co. vs. White's adm'x*, and of Bond, J., of the United States Circuit Court, of the Eastern District of Virginia, in the case of *Hancock et alor vs. New York Life Ins. Co.* In these cases, as well as that of *Tait vs. New York Life Ins. Co.*,\* the main question is, whether policies of life insurance were rendered null and void by the non-payment of premiums, during the civil war. As this is one of the most important subjects in litigation among life insurance companies at the present time, and as this question will have to be adjudicated in the Supreme Court of the United States, we deem no apology or explanation necessary for publishing all the decisions, conflicting as they are, on this point.

## ITEMS.

—The bulletin of the National Board of Underwriters contains the following sensible idea:

"Members of State Auxiliaries will do well to mark the progress of all legislation upon the taxation of insurance capital, whether local or foreign. Legislators are in need of experienced advice upon the subject, and stand ready to receive it; and officers and agents of companies should not fail to watch their opportunities to give all the information they possess upon the subject. The most favorable mode to seek a uniform and equitable taxation is to present the case to conventions or commissions having new State constitutions under advisement. The latter body is the more effective of the two, as being generally formed of experts in law making; and so far New Jersey and Michigan have been favored. In the latter State the Commission have just completed a revision of the State Constitution, and the revised form is to be printed for the use of the Legislature and the people, and will be subject to the approval of a popular vote."

—At New Haven, Conn., on the 1st Nov., a suit was commenced against Daniel Healy, by M. F. Tyler and C. F. Ballman, acting in the name of the treasurer of the State and the insurance commissioner, which is of considerable interest to insurance men generally. The *Press* of that city says:

"The charge against Mr. Healy is a violation of the insurance law of 1871, in taking insurance for a company not registered in this State. This company is the *Hibernia Mutual Ins. Co.*, of Newark, N. J., which has not capital enough to qualify it for doing a legitimate business in this State—claiming only \$100,000, while \$150,000 is the lowest amount

\* 2 *Ins. Law Jour'*, 883.

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